

ENTERED ON DOCKET

DATE 1-31-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANA M. CARD,

Plaintiff,

v.

SALLY BEAUTY COMPANY, INC.,

Defendant.

No. 95-C-644H

**FILED**  
JAN 31 1996  
Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 30th day of JANUARY, 1996, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

S/ SVEN ERIK HOLMES  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 31 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

GARY LADD,

Plaintiff,

v.

SERTOMA HANDICAPPED  
OPPORTUNITY PROGRAM, INC.,  
an Oklahoma corporation, and  
CLARENCE CAGLE,

Defendants.

Case No. 95-C-499-H ✓

ENTERED ON DOCKET

1-31-96

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendants, by and through their respective attorneys, jointly stipulate that all of Plaintiffs' claims herein should be dismissed with prejudice with each side to bear its own costs and attorneys fees.

DATED this 31st day of January, 1996.

Respectfully submitted,

By: 

David R. Blades  
P.O. Box 960  
Jay, Oklahoma 74346

HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.

By: 

Frank M. Hagedorn, OBA #3693  
Judith A. Colbert, OBA #13490  
320 South Boston Avenue  
Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0400

ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 1-31-96

UNITED STATES OF AMERICA,  
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

GLADYS C. HORN aka Gladys Carlene Horn;  
CENTRAL AIR DISTRIBUTORS;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

**FILED**

JAN 31 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

) CIVIL ACTION NO. 95-C-596-H

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 31<sup>st</sup> day of JANUARY, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Gladys C. Horn aka Gladys Carlene Horn and Central Air Distributors**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Gladys C. Horn aka Gladys Carlene Horn**, executed a Waiver of Service of Summons on July 10, 1995 which was filed on July 12, 1995.

The Court further finds that the Defendant, **Central Air Distributors**, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a

newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 11, 1995, and continuing through November 15, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, **Central Air Distributors**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Central Air Distributors**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to its present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answers on

July 13, 1995; that the Defendants, **Gladys C. Horn aka Gladys Carlene Horn and Central Air Distributors**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on December 2, 1988, Gladys Carlene Horn filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 88-03671-W. On March 13, 1989, a discharge was granted. Subsequently, Case No. 88-03671-W, United States Bankruptcy Court for the Northern District of Oklahoma, was closed on April 28, 1989.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Thirty-nine (39), Block Forty-five (45), Valley View Acres  
Second Addition to the City of Tulsa, Tulsa County,  
Oklahoma, according to the recorded plat thereof.**

The Court further finds that on September 2, 1972, Gladys C. Horn, a single person, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, her mortgage note in the amount of \$10,250.00, payable in monthly installments, with interest thereon at the rate of 4.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Gladys C. Horn, a single person, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated September 2, 1972, covering the above-

described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on September 5, 1972, in Book 4033, Page 252, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, **Gladys C. Horn aka Gladys Carlene Horn**, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Gladys C. Horn aka Gladys Carlene Horn**, is indebted to the Plaintiff in the principal sum of \$4,069.17, plus administrative charges in the amount of \$440.00, plus penalty charges in the amount of \$14.72, plus accrued interest in the amount of \$55.68 as of April 18, 1995, plus interest accruing thereafter at the rate of 4.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$578.65 (\$155.00 fees for abstracting, \$100.00 fee for evidentiary affidavit, \$315.65 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$113.00, plus penalties and interest, for the year 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Central Air Distributors**, is in default and therefore has no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against the Defendant, **Gladys C. Horn aka Gladys Carlene Horn**, in the principal sum of \$4,069.17, plus administrative charges in the amount of \$440.00, plus penalty charges in the amount of \$14.72, plus accrued interest in the amount of \$55.68 as of April 18, 1995, plus interest accruing thereafter at the rate of 4.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.16% percent per annum until paid, plus the costs of this action in the amount of \$578.65 (\$155.00 fees for abstracting, \$100.00 fee for evidentiary affidavit, \$315.65 publication fees, \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$113.00, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **Central Air Distributors and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, **Gladys C. Horn aka Gladys Carlene Horn**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell

according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

**Third:**

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

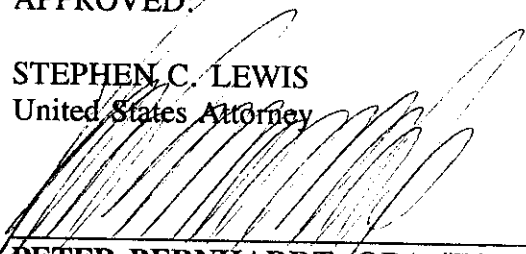
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



  
\_\_\_\_\_  
**DICK A. BLAKELEY, OBA #852**

Assistant District Attorney  
406 Tulsa County Courthouse  
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(918) 596-4841

Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Case No. 95-C-596-H

PB:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

RANDALL S. THOMAS,  
SS# 494-44-3747

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security,<sup>1)</sup>

Defendant.

JAN 31 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

No. 94-C-952-J ✓

ENTERED ON CLERK

1-31-96

ORDER<sup>2)</sup>

Plaintiff, Randall S. Thomas, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.<sup>3)</sup> Plaintiff asserts error because (1) the Secretary's decision was not supported by substantial evidence, and (2) the ALJ ignored relevant evidence in reaching the conclusion that

<sup>1)</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

<sup>2)</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

<sup>3)</sup> Plaintiff filed an application for disabled child benefits on July 3, 1991. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge John M. Slater (hereafter, "ALJ") was held June 9, 1992. *R. at 65-101*. By order dated August 17, 1992, the ALJ determined that Plaintiff was not disabled. *R. at 377-390*. The Plaintiff appealed the ALJ's decision to the Appeals Council. On June 9, 1993, the Appeals Council remanded the case to the ALJ for clarification of a rating given by the ALJ on the Psychiatric Review Technique form ("PRTF"). *R. at 404-05*. A second hearing before the ALJ was held October 25, 1993. *R. at 102-131*. By decision dated January 14, 1994, the ALJ determined Plaintiff was not disabled. *R. at 36-54*. Plaintiff again appealed the ALJ's decision to the Appeals Council. By order dated August 4, 1994, the Appeals Council denied Plaintiff's request for review. *R. at 4*.

Plaintiff was not disabled. For the reasons discussed below, the Court reverses the Secretary's decision and remands this case to the Secretary for proceedings consistent with this opinion.

### **I. PLAINTIFF'S BACKGROUND**

Plaintiff was born October 5, 1971. *R. at 133.* Plaintiff completed high school, taking predominantly special education classes. *R. at 70.* Plaintiff also completed a vocational education class in high school. *R. at 70.*

### **II. STANDARD OF REVIEW**

The Secretary has established a five-step process for the evaluation of social security claims.<sup>41</sup> See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

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<sup>41</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Secretary's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Secretary is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will, however, meticulously examine the entire record. Williams, 844 F.2d at 750.

"The finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

### III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff had no past relevant work. *R. at 49.* The ALJ found that Plaintiff was in the borderline range of mental retardation, but did not meet a Listing. *R. at 49.* The ALJ concluded that Plaintiff was not disabled, and that a significant number of jobs existed in the national economy which Plaintiff could perform. *R. at 49.*

### IV. REVIEW

Plaintiff argues that the ALJ erred by not properly considering Plaintiff's other related problems which prohibit Plaintiff from maintaining employment. Plaintiff asserts that the ALJ's conclusion that Plaintiff could work was not supported by substantial evidence.

The ALJ determined, at Step Five, that Plaintiff's mental impairment was not disabling. The ALJ noted that Plaintiff's I.Q. tests indicated Plaintiff's I.Q. as above 70 since September 1988. *R. at 41.* The ALJ found that Plaintiff was unorganized, but that the only evidence in the record which supported Plaintiff's claimed deficiencies of concentration, persistence or pace were statements from Plaintiff and Plaintiff's mother. *R. at 42.*

With respect to Plaintiff's asserted mental problems, the ALJ completed a Psychiatric Review Technique form ("PRTF"), indicating that Plaintiff had slight "restrictions of daily living,"<sup>5\</sup> no "difficulty maintaining social functioning,"<sup>6\</sup> seldom

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<sup>5\</sup> "Activities of daily living include adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for one's grooming and hygiene, using telephones and directories, using a post office, etc." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(1) (italics original).

had "deficiencies of concentration,"<sup>71</sup> and never had "episodes of deterioration in work."<sup>81</sup> *R. at 54.* For a claimant's mental impairment to be severe enough to meet or equal a mental impairment listing, the claimant must have sufficient limitation in at least two of the four functional areas mentioned above. The PRTF rates the degree of functional loss for the first two areas (*i.e.*, daily activities and social functioning) as "none," "slight," "moderate," "marked" and "extreme." Only a "marked" or "extreme" rating in these first two areas is significant enough to meet or equal a mental impairment listing. The PRTF rates the degree of functional loss for the third area (*i.e.*, concentration, etc.) as "never," "seldom," "often," "frequent" and "constant." Only a "frequent" or "constant" rating in this third area is significant enough to meet or equal a mental impairment listing. The PRTF rates the degree of functional loss for the fourth area (*i.e.*, decompensation or deterioration) as "never," "once/twice," "repeated" and "continual." Only a "repeated" or "continual" rating in this fourth area is significant enough to meet or equal a mental impairment listing.

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<sup>81</sup> "Social functioning refers to an individual's capacity to interact appropriately and communicate effectively with other individuals. Social functioning includes the ability to get along with others. . . . Social functioning in work situations may involve interactions with the public, responding appropriately to persons in authority, e.g., supervisors, or cooperative behaviors involving coworkers." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(2) (*italics original*).

<sup>71</sup> "Concentration, persistence and pace refer to the ability to sustain focused attention sufficiently long to permit the timely completion of tasks commonly found in work settings." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(3) (*italics original*).

<sup>81</sup> "Deterioration or decompensation in work or work-like settings refers to repeated failure to adapt to stressful circumstances which cause the individual either to withdraw from that situation or to experience exacerbation of signs and symptoms (*i.e.*, decompensation) with an accompanying difficulty in maintaining activities of daily living, social relationships, and/or maintaining concentration, persistence, or pace (*i.e.*, deterioration which may include deterioration of adaptive behaviors). Stresses common to the work environment include decisions, attendance, schedules, completing tasks, interactions with superiors, interactions with peers, etc." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(4).

The ALJ rated Plaintiff's functional limitations (as a result of mental impairments) as slight in area one, none in area two, seldom in area three, and none in area four. *R. at 54.* In other words, the ALJ found that Plaintiff's mental impairment did not significantly limit him in any of the four functional areas. However, the ALJ's rating of Plaintiff's mental impairment restrictions is not supported by the record.

The record includes two separate psychiatric reviews, which indicate that Plaintiff's restrictions are greater than suggested by the ALJ. A PRTF, completed by Carolyn Goodrich, Ph.D., on January 8, 1992, indicated that Plaintiff's restrictions were slight in area one, slight in area two, often in area three, and repeated in area four. *R. at 172.* Dr. Goodrich concluded that Plaintiff is "capable of understanding and performing simple tasks, but not complex ones," that Plaintiff can interact with others and adapt to work situation, and that Plaintiff "will need extra supervision until his job tasks are well learned." *R. at 176.*

A PRTF was also completed by C.M. Kampschaefer, Psy.D., on September 24, 1991. Dr. Kampschaefer noted that Plaintiff "can do simple tasks, [is] able to sustain a simple routine with regular supervision, [and] can relate on a superficial basis, [but] not with the general public." *R. at 181.* Dr. Kampschaefer rated Plaintiff's restrictions as moderate in area one, moderate in area two, often in area three, and once/twice in area four. *R. at 189.*

If a claimant meets or equals a Listing, the claimant is disabled. 20 C.F.R. § 1520a(c)(2). In this case, none of the three PRTFs indicate that Plaintiff meets a Listing.

Although the regulations do not specify that a rating above "none" or "slight" is presumed "severe," that is the logical inference. See Hargis v. Sullivan, 945 F.2d 1482, 1488 n.5 (10th Cir. 1991). Two PRTFs indicate Plaintiff's ratings in at least two of four categories is above "none" or "slight." Consequently, the ALJ's conclusion that Plaintiff's mental impairment was not "severe" is not supported by the record. The ALJ should have assessed Plaintiff's RFC, giving due consideration to Plaintiff's mental impairment. 20 C.F.R. § 404.1520a(c)(3); Soc. Sec. Rep. Serv., Rulings 1983-1991, SSR 85-16 (West 1985). When a claimant does not meet or equal a Listing, the claimant's residual functional capacity must still be assessed to determine the level, if any, of the claimant's impairment. 20 C.F.R. § 1520a(c)(3).

Any of Plaintiff's mental impairments should have been presented in a hypothetical to the vocational expert. In this case, the hypothetical question to the vocational expert included only Plaintiff's IQ, and did not include any of Plaintiff's other possible mental limitations. *R. at 93, 124.* (Two of Plaintiff's examiners indicated Plaintiff would have difficulty remembering tasks or performing complex ones, would have trouble relating to the public or interacting with others, and would require additional supervision.) On remand, the ALJ should include the severe mental limitations described in the psychiatric reports contained in the record, in the hypothetical question presented to a vocational expert.

In addition some of the findings of the ALJ are not supported by the record. The ALJ found that the only testimony supporting a finding that Plaintiff had deficiencies of concentration were statements from Plaintiff or Plaintiff's mother. The



record does contain statements from Plaintiff and Plaintiff's mother that Plaintiff has difficulty remembering details, concentrating, and performing tasks. However, the record also contains numerous statements by Plaintiff's teachers that Plaintiff has difficulty remembering details and completing tasks. The comment section on one of Plaintiff's Intellectual Evaluations notes that Plaintiff's teacher indicated that Plaintiff "has difficulty remembering information from day to day." *R. at 31*. On his classroom completion report (for World History) Plaintiff's teacher noted that Plaintiff was "easily distracted, does not complete his work [and] gives up too easily." *R. at 229*. Numerous school records indicate that Plaintiff had difficulty remembering or retaining information. *R. at 268, 303*. Plaintiff's activity assessment, from Laureate Psychiatric Clinic and Hospital (August 13, 1990) indicated that Plaintiff has "difficulty following directions with initial instructions." *R. at 369*. The ALJ does not address the reports from Plaintiff's teachers that Plaintiff had difficulty remembering information and completing tasks.

The ALJ also noted that Plaintiff played drums in the high school band, played pool and basketball with his friends, played dungeons and dragons, had successfully obtained his learners permit, and sometimes ran errands for his mother. *R. at 42-44*. The only reference in the record to Plaintiff playing drums in the high school band was included in the history given by Plaintiff to a nurse during his admission to Laureate Psychiatric Clinic & Hospital ("Laureate"). *R. at 364*. Plaintiff testified that he played drums in elementary and junior high school. *R. at 109*. Plaintiff's mother indicated that Plaintiff played drums only in the fifth grade. *R. at 12*. The only reference to

Plaintiff's playing dungeons and dragons is contained in Plaintiff's medical history and disability report form. *R. at 149*. Plaintiff noted that "I go to a friends house to read or swim or walk around the mall. We play dungens [sic] and dragons." *R. at 149*. Nothing indicates Plaintiff's capability or playing level. Plaintiff additionally testified that he flunked drivers education in high school. *R. at 72-73*. (Plaintiff's mother contended that Plaintiff received a "D" in driver's education.) *R. at 12*. Although Plaintiff obtained his learners permit, Plaintiff, who was 22 at the time of the second hearing, had not obtained his driver's license. *R. at 72-73*.

In addition, the ALJ noted that Plaintiff was mainstreamed in several classes, including physical education, woodshop, typing, and history. *R. at 44*. The ALJ also observed that Plaintiff maintained good grades in his educable mentally handicapped classes. *R. at 44*. However, Plaintiff's typing class was pass/fail. *R. at 250*. Plaintiff's history class was a "low level class," and Plaintiff's teacher noted on November 30, 1988 that Plaintiff was easily distracted and did not complete his assignments. *R. at 229*.

The ALJ noted that Plaintiff had post traumatic stress disorder, had attempted suicide, and had major depression after being raped. However, the ALJ concluded that Plaintiff had responded well to treatment, that his trauma was not severe, and that his depression did not last for 12 consecutive months. *R. at 40-41*. The ALJ observed that although Plaintiff used drugs for a period of time (including speed, marijuana, and "white crosses") Plaintiff testified that he had not used drugs since

1990. *R. at 40.* The ALJ concluded that Plaintiff's mental impairments were not "severe." *R. at 46.*

Plaintiff was admitted on August 8, 1990 to Laureate. Plaintiff's Laureate records indicate he left home because he believed his mother was oppressive and trying to control his life. *R. at 321.* Plaintiff also stated that his mother was an alcoholic. *R. at 359-60.* While Plaintiff was living on the streets, he was raped by a man. The Laureate records indicate Plaintiff claimed to be depressed and suicidal following the rape. *R. at 321.* Plaintiff attempted to commit suicide on at least three occasions. *R. at 319.* The record also indicates Plaintiff used speed and "white crosses." *R. at 321.* Plaintiff also reported that he used alcohol on weekends until he passed out or threw up. *R. at 320.* Plaintiff was diagnosed with major depression from a single episode, post-traumatic stress disorder, dysthymic disorder,<sup>91</sup> and substance abuse. *R. at 320.* Plaintiff was discharged when he was no longer suicidal. *R. at 320.*

The ALJ additionally noted that the testimony of Plaintiff's mother was contradictory. *R. at 45.* Plaintiff's mother testified that Plaintiff had a "rebellious stage" during junior high and did not get along with his peers. Plaintiff's mother additionally testified that Plaintiff was suspended from school for three days for fighting in a shop class. *R. at 82.* Plaintiff lost his temper at work,<sup>101</sup> took a swing

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<sup>91</sup> Dysthymia is a "chronic, mild form of depression hat has been present for at least two years." *Taber's Cyclopedic Medical Dictionary 594 (17th ed. 1993)*

<sup>101</sup> The ALJ found that Plaintiff's work did not constitute "substantial gainful activity." Plaintiff worked at several food places (Burger King, Red Lobster, McDonalds), doing kitchen work and preparing orders. Plaintiff testified that he was fired because he was not fast enough, switched orders, and could

at another employee, and broke his hand. *R. at 86.* Plaintiff's mother testified that Plaintiff sometimes exhibited violent behavior at home, has dented in a couple of doors, and has taken aggression out on his dog. *R. at 86.* Plaintiff's mother additionally testified, at the October 25, 1993 hearing that "Scott is very easy going, very lovable, very friendly, and he's just like a little puppy, you know, and people just draw to him, and he just is as sweet as he can be, and sometimes it's -- can be detrimental -- . . . ." *R. at 116.* Plaintiff's mother suggests her testimony is not contradictory because she is discussing Plaintiff's behavior during different time periods--that is, comparing behavior from 1985 to behavior in 1992. *R. at 14.* However, her testimony does not appear to impose such time restrictions. *R. at 115-116 ("common theme" throughout junior high and high school that Scott was well liked; in question portion of text).* The ALJ's finding that the testimony of Plaintiff's mother was, at times, contradictory is supported by the record.

Credibility determinations are issues for the finder of fact and are given great deference by the court. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). However, an ALJ's findings must be supported by substantial evidence. The ALJ discounts the testimony of Plaintiff and Plaintiff's mother due to contradictions. However, even given due consideration to such contradictions, some of the conclusions of the ALJ are not supported by substantial evidence.

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not remember tasks. *R. at 76-77.*

Accordingly, the Secretary's decision is **REVERSED AND REMANDED**.

Dated this 31 day of January 1996.

A handwritten signature in cursive script, appearing to read "Sam A. Joyner", written over a horizontal line.

Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

RANDALL S. THOMAS,  
SS# 494-44-3747

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security,<sup>1)</sup>

Defendant.

No. 94-C-952-J ✓

**FILED**

JAN 31 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

1-31-96

**JUDGMENT**

This action has come before the Court for consideration and an Order remanding the case to the Secretary has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 31 day of January 1996.

  
Sam A. Joyner  
United States Magistrate Judge

<sup>1)</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

ENTERED ON DOCKET  
DATE 1-31-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARY CATHERINE SWAYNE;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

JAN 30 1996

DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C 1084H ✓

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of Jan 30, 1996 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **MARY CATHERINE SWAYNE**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, RICHARD M. LAWRENCE, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 30th day of January 1996.

**RICHARD M. LAWRENCE**, Clerk  
United States District Court for  
the Northern District of Oklahoma

By S. Adamski  
Deputy

7

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NORAM GAS TRANSMISSION COMPANY,  
a Delaware corporation,

Plaintiff,

v.

ENTERPRISE RESOURCE CORPORATION,  
an Arkansas corporation; ALAN G.  
MIKELL; and TIDEMARK EXPLORATION,  
INC., an Oklahoma corporation,

Defendants.

Case No. 94-C-773-H

ENTERED ON DOCKET  
DATE 1-31-96

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiff, NorAm Gas Transmission Company, and Defendants,  
Enterprise Resource Corporation and Alan G. Mikell hereby  
stipulate to the dismissal without prejudice of all claims  
against defendant Tidemark Exploration, Inc. in this litigation.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.

By: 

J. Kevin Hayes, OBA #4003  
Claire V. Eagan, OBA #554  
Mark Banner, OBA #13243  
320 S. Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0400

ATTORNEYS FOR PLAINTIFF, NORAM GAS  
TRANSMISSION COMPANY

and



DOYLE & HARRIS

By: *Michael D. Davis*

Steven M. Harris  
Michael D. Davis  
2431 E. 61st, Suite 260  
Tulsa, OK 74136  
(918) 743-1276

ATTORNEYS FOR DEFENDANTS  
ENTERPRISE RESOURCE CORPORATION,  
ALAN G. MIKELL AND TIDEMARK  
EXPLORATION, INC.

**CERTIFICATE OF MAILING**

I do hereby certify that on the 30<sup>th</sup> day of January, 1996, I caused a true and correct copy of the above and foregoing instrument to be mailed to the following parties, with proper postage fully prepaid thereon:

J. KEVIN HAYES  
MARK BANNER  
HALL ESTILL HARDWICK GABLE GOLDEN & NELSON  
320 SOUTH BOSTON, SUITE 400  
TULSA, OK 74103  
(918) 588-2700

ALAN MIKELL  
TIDEMARK EXPLORATION, INC.  
2526-J EAST 71ST STREET  
P O BOX 702675  
TULSA OK 74170

ENTERPRISE RESOURCES CORP.  
C/O STEVE KOLB  
200 GARRISON AVENUE  
SUITE 432  
FORT SMITH, AR 72901

  
\_\_\_\_\_

**FILED**

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

DATE JAN 31 1996

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Paul Gandy, for the principal amount of \$69,719.95, plus accrued interest of \$1,530.48, plus interest thereafter at the rate of 8.63 percent per annum until judgment, a surcharge of 10% of the

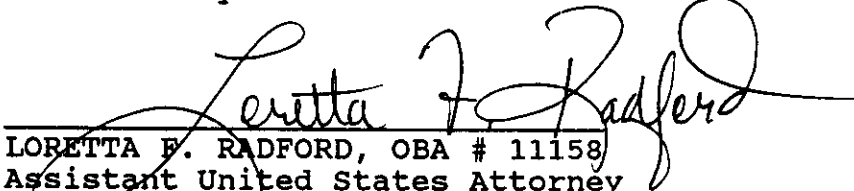
amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 5.16 percent per annum until paid, plus costs of this action.

S/ THOMAS R. BRETT

---

United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
JAN 31 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

WENDELL TENISON and BETTY  
TENISON, individually and  
as husband and wife,

Plaintiffs,

vs.

BIXBY PUBLIC WORKS AUTHORITY,

Defendant.

Case No. 96-C-35-BU ✓

ENTERED ON DOCKET

DATE JAN 31 1996 ✓

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Court Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

ENTERED this 31<sup>st</sup> day of January, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS  
BY MOVANT TO ALL JOINT  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAN 31 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

WENDELL TENISON and BETTY  
TENISON, individually and  
as husband and wife,

Plaintiffs,

vs.

Case No. 95-C-509-BU ✓

CITY OF BIXBY, an Oklahoma  
Corporation; MICKY WEBB,  
as an individual and in his  
capacity as CITY MANAGER OF  
BIXBY, OKLAHOMA; BIXBY CITY  
COUNCIL MEMBERS in their  
capacity as city council  
members; Trustees of the  
BIXBY PUBLIC WORKS AUTHORITY  
in their capacity as trustees;  
JOE WILLIAMS, individually;  
and ED STONE, individually,

Defendants.

ENTERED ON DOCKET ✓

DATE JAN 31 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Court Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

ENTERED this 31<sup>st</sup> day of January 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED  
BY MOVANT TO ALL COUNTEES  
PRO SEC. CLERK JAN 31 1996  
UPON REC.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JAN 31 1996

UNITED STATES OF AMERICA,  
on behalf of the Secretary of  
Housing and Urban Development,

Plaintiff,

v.

TOMMY EVANS aka Tommy L. Evans;  
SPOUSE, if any, OF TOMMY EVANS  
aka Tommy L. Evans;  
DELORES EVANS aka Delores Ann Evans  
aka Delores A. Evans;  
SPOUSE, if any, OF DELORES EVANS  
aka Delores Ann Evans  
aka Delores A. Evans;  
STATE OF OKLAHOMA ex rel.  
Oklahoma Tax Commission;  
CITY OF GLENPOOL;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

JAN 31 1996  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 95-C-435-BU

**ORDER**

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

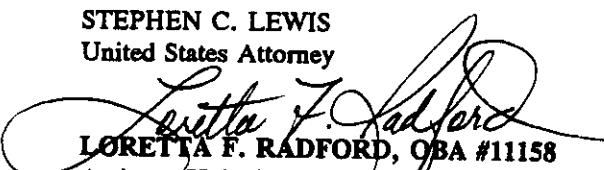
Dated this 31<sup>st</sup> day of Jan, 1996.

**s/ MICHAEL BURRAGE**

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

  
LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

OLLIS EARL BROWN;  
MARY LOUISE BROWN aka Mary Titus;  
GOLDEN EAGLE FEDERAL CREDIT UNION  
fka McDonnell Douglas Tulsa Federal Credit Union;  
STATE OF OKLAHOMA ex rel.  
Oklahoma Tax Commission;  
TULSA ADJUSTMENT BUREAU, INC.;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

FILED

JAN 31 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JAN 31 1996

CIVIL ACTION NO. 95-C-642-BU

**ORDER**

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed with prejudice.

Dated this 31<sup>st</sup> day of Jan, 1996.

s/ MICHAEL SURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

*Phil Pinnell*  
PHIL PINNELL, OBA #7169  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



ENTERED ON DOCKET

DATE JAN 31 1996

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONNELL WILLIAMS; RAMONA K.  
WILLIAMS; FORD CONSUMER  
CREDIT COMPANY; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

Civil Case No. 95-C 695BU

FILED  
JAN 31 1996  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 31<sup>st</sup> day of Jan,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, CONNELL WILLIAMS, RAMONA K. WILLIAMS, and FORD CONSUMER CREDIT COMPANY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, CONNELL WILLIAMS and RAMONA K. WILLIAMS, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, CONNELL WILLIAMS, waived service of Summons on August 21, 1995; that the Defendant, RAMONA K. WILLIAMS, waived service of Summons on August 21, 1995;

NOTE: THIS ORDER IS TO BE FILED  
BY MOVANT TO BE  
PRO SE LITIGANT  
UPON RECEIPT

and that the Defendant, FORD CONSUMER CREDIT COMPANY, waived service of Summons on September 1, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on August 14, 1995; and that the Defendants, CONNELL WILLIAMS, RAMONA K. WILLIAMS, and FORD CONSUMER CREDIT COMPANY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on September 25, 1995, CONNELL WILLIAMS and RAMONA KAYE WILLIAMS filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 95-02957-W. On January 19, 1996, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-three (23), Block Seven (7), FAIRHILL 2ND ADDITION, a Subdivision to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

The Court further finds that on August 14, 1979, the Defendants, CONNELL WILLIAMS and RAMONA K. WILLIAMS, executed and delivered to MIDLAND

MORTGAGE CO. their mortgage note in the amount of \$26,150.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, CONNELL WILLIAMS and RAMONA K. WILLIAMS, Husband and Wife, executed and delivered to MIDLAND MORTGAGE CO. a mortgage dated August 14, 1979, covering the above-described property. Said mortgage was recorded on August 20, 1979, in Book 4421, Page 804, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 31, 1988, Midland Mortgage Co. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 5, 1988, in Book 5091, Page 535, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 16, 1988, the Defendants, CONNELL WILLIAMS and RAMONA K. WILLIAMS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on August 8, 1988, July 5, 1989, June 26, 1990, February 21, 1991, February 25, 1992, April 1, 1993, and September 15, 1993.

The Court further finds that the Defendants, CONNELL WILLIAMS and RAMONA K. WILLIAMS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, CONNELL WILLIAMS and RAMONA K.

WILLIAMS, are indebted to the Plaintiff in the principal sum of \$36,182.99, plus interest at the rate of 10 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$15.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$15.00 which became a lien as of June 25, 1993; a lien in the amount of \$22.00 which became a lien as of June 26, 1992; a lien in the amount of \$4.00 which became a lien as of July 2, 1990, and a lien in the amount of \$5.00 which became a lien as of July 5, 1989. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, CONNELL WILLIAMS, RAMONA K. WILLIAMS, and FORD CONSUMER CREDIT COMPANY, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, CONNELL

WILLIAMS and RAMONA K. WILLIAMS, in the principal sum of \$36,182.99, plus interest at the rate of 10 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.16 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$61.00, plus costs and interest, for personal property taxes for the years 1988, 1989, 1991-1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, CONNELL WILLIAMS, RAMONA K. WILLIAMS, FORD CONSUMER CREDIT COMPANY, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, CONNELL WILLIAMS and RAMONA K. WILLIAMS, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

**Third:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$61.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

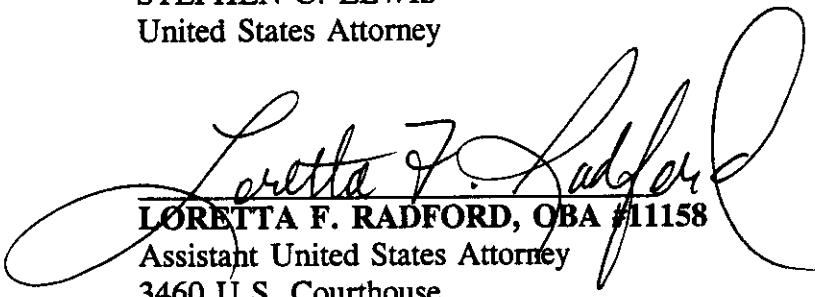
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.


**s/ MICHAEL BURRAGE**  
**UNITED STATES DISTRICT JUDGE**

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



**DICK A. BLAKELEY, OBA #852**  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95-C 685BU

LFR/lg

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 30 1996

ENTERED ON DOCKET

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

MARY DONAHUE,

DATE JAN 31 1996

Plaintiff,

v.

CASE NO. 95-C-240-B ✓

UNITED STATES POSTAL SERVICE

Defendant.

O R D E R

This matter comes on for consideration of Defendant's Motion To Dismiss Or, In The Alternative, For Allowance Of Statutory Time To Plead Or Otherwise Respond, (docket # 3), filed January 3, 1996. Plaintiff has failed to respond to Defendant's motion.

The Complaint in this matter was filed March 15, 1995. The record failed to reflect any Return of Service indicating service upon the Defendant. The case was subject to dismissal without prejudice pursuant to Rule 4(m), Federal Rules of Civil Procedure.

At the status conference held November 15, 1995, and by Order entered November 15, 1995, the Court allowed Plaintiff ten (10) days from that date to effect proper service upon Defendant failing which this matter would be DISMISSED with prejudice. Plaintiff made a putative attempt to serve the U.S. Attorney's office by leaving a summons with the United States Court Clerk's office on November 22, 1995.

The Court concludes this is ineffectual service upon the

(4)



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 30 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

MICHAEL LEWIS, et al.,

Plaintiffs,

vs.

Case No. 94-C-805K

ARMELLINI ENGINEERING, INC.,

et al.,

Defendants.

ENTERED ON DOCKET

DATE JAN 31 1996

**JUDGMENT**

This matter came before the Court for consideration of the Motion by Defendant General American Life Insurance Company for Summary Judgment against Plaintiffs.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant General American Life Insurance Company and against the Plaintiffs.

ORDERED THIS DAY OF 26 JANUARY, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 30 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

MICHAEL LEWIS, et al.,

Plaintiffs,

vs.

Case No. 94-C-805K

ARMELLINI ENGINEERING, INC.,  
et al.,

Defendants.

ENTERED ON DOCKET  
DATE JAN 31 1996

ORDER

Before this Court is Defendant General American Life Insurance Company's Motion for Summary Judgment and Plaintiffs' Countermotion for Summary Judgment.

I. Facts

Plaintiffs are former employees of Defendant Armellini Engineering, Inc. ("Armellini"). Armellini had a group health insurance policy ("policy") with General American Life Insurance Company ("General American") effective December 1, 1993. Armellini performed the duties of health plan administrator. Armellini failed to pay its premiums for January 1994 or for any subsequent month. Pursuant to the terms of the insurance contract, Armellini's coverage terminated on January 31, 1994. Following the January 31, 1994 termination, General American repeatedly urged

Armellini to pay its overdue premiums, but to no avail. On May 5, 1994, General American notified Armellini that its policy had lapsed for non-payment of premiums as of January 31, 1994.

After the date the policy lapsed, but before Plaintiffs were notified by either Armellini or General American that Plaintiffs were no longer covered, they incurred medical expenses.<sup>1</sup> As former employees and their dependents, Plaintiffs were covered by Armellini's health insurance plan through January 31, 1994, by virtue of "COBRA" portions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1161 et seq. Plaintiffs contend that General American is liable for medical expenses incurred after the termination of Armellini's policy. Defendant maintains that under ERISA it is not liable for any expenses incurred after the termination of its coverage of Armellini and that Plaintiffs' asserted federal common law and state law causes of action are foreclosed.

## II. Summary Judgment Standard

Summary judgment, pursuant to Fed. R. Civ. P. 56, is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Widon Third Oil

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<sup>1</sup> Plaintiffs Nicole and Stan Franklin as well as Debbie and Michael Lewis sustained medical expenses associated with the birth of their children. (See Franklin Aff. ¶ 3; Lewis Aff. ¶ 3.) Plaintiff Ruth Banks sustained medical expenses associated with foot surgery. (See Banks Aff. ¶ 4.)

and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986), cert denied, 480 U.S. 947 (1987). The Supreme Court explains:

[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson, 477 U.S. at 252.

### III. Discussion

The Supreme Court has noted that ERISA supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 43, 47-48, 54 (1987) (holding that ERISA preempts claims of tortious breach of contract, breach of fiduciary duties, and fraud in the inducement). See also Straub v. Western Union Telegraph Co., 851 F.2d 1262, 1263 (10th Cir. 1988) (noting the broad scope of ERISA preemption). Indeed, Plaintiffs concede that the policy is governed by ERISA. If ERISA were strictly applied, Plaintiffs would have no claim since Plaintiffs' coverage under COBRA ceased by statute upon the policy's termination on January 31, 1994. See 29 U.S.C. § 1162(2)(B) (providing that COBRA coverage ends on the date on which

the employer ceases to provide any group health plan to any employee).

Therefore, in order to extend General American's liability beyond the statutory cut-off, Plaintiffs urge this Court to recognize a federal common law estoppel claim under ERISA based upon General American's alleged gross negligence. Plaintiffs contend that General American was grossly negligent because it allegedly made representations to them and their health care providers that Plaintiffs were covered under the policy when in fact the policy had already been terminated for failure to pay premiums. Plaintiffs also contend that General American violated the terms of its own policy by failing to terminate its policy upon expiration of the grace period.<sup>2</sup> Plaintiffs say in their brief,

General American's gross negligence of failing to follow its own guidelines, caused the medical providers and the Plaintiffs to believe that they were under coverage by General American. Without proper notice of the termination, the Plaintiffs had no reason to believe that they were not covered, and further, a reason to seek out and engage in medical insurance to cover them for future medical care treatment.

(Plaint. Resp. Ctr. Mot. Summ. J. at 4-5.).

While the events that gave rise to this litigation have put Plaintiffs in unfortunate circumstances, the Tenth Circuit has explicitly stated that such a federal common law estoppel theory is not available under ERISA. Miller v. Coastal Corp., 978 F.2d 622, 625 (10th Cir. 1992), cert. denied sub. nom Miller v. Pension Plan,

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<sup>2</sup> The policy stated that if the policyholder does not pay the premium, the policy will cease to be in effect at the end of a 31-day grace period.

113 S.Ct. 1586 (1993). The Tenth Circuit has declined to recognize a federal common law estoppel claim under ERISA both when the claim is based upon an oral statement by the insurer, Straub v. Western Union Telegraph Co., 851 F.2d 1262, 1265 (10th Cir. 1988), as well as an informal written communication by the insurer, Miller, 978 F.2d at 624-25. The court has said that "ERISA's express requirement that the written terms of a benefit plan shall govern forecloses the argument that Congress intended for ERISA to incorporate state law notions of promissory estoppel." Miller, 978 F.2d at 624 (quoting Straub, 851 F.2d at 1265-66). See also Peckham v. Gem State Mutual, 964 F.2d 1043, 1050 (10th Cir. 1992) (applying Straub to hold that claims based on the doctrine of promissory estoppel are precluded by ERISA). In the instant case Plaintiffs base their claims of promissory estoppel on alleged oral representations and informal written communications (claims advice statements) by General American. Straub and Miller foreclose Plaintiffs' claims.

Nor can Plaintiffs' allegations of gross negligence on the part of General American salvage Plaintiffs' promissory estoppel argument. The Tenth Circuit has not allowed such an exception to its Straub-Miller rule. While the Tenth Circuit has suggested that an estoppel claim might be available if the insurer engaged in lies, fraud, or intent to deceive, Miller v. Coastal Corp., 978 F.2d at 625 (*dicta*), Plaintiffs have made no such allegations, and there is no evidence of such conduct in the instant case. Consequently, this Court is bound by the Tenth Circuit's explicit

bar against promissory estoppel claims under ERISA.

General American's Motion for Summary Judgment is therefore  
GRANTED.

ORDERED this 26 day of January, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JAN 30 1996

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARY ANNE DAY; JOHN MUETZEL  
dba Laundry & C&G Corporation;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JAN 31 1996

Civil Case No. 95 C 983BU

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 30 day of Jan,  
1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern  
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the  
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY  
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District  
Attorney, Tulsa County, Oklahoma; the Defendant, JOHN MUETZEL dba C&G Laundry and  
C&G Corporation, appears by his Attorney, Thomas A. LeBlanc; and the Defendant, Mary  
Anne Day, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the  
Defendant, JOHN MUETZEL dba C&G Laundry and C&G Corporation, signed a Waiver of  
Summons on October 24, 1995; and that the Defendant, MARY ANNE DAY, signed a  
Waiver of Summons on November 1, 1995.

NOTE: THIS ORDER IS TO BE MAILED  
BY CLERK TO ALL COUNCIL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.



It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on October 12, 1995; that the Defendant, JOHN MUETZEL dba C&G Laundry and C&G Corporation, filed his Answer on November 27, 1995; and that the Defendant, MARY ANNE DAY, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, MARY ANNE DAY, is a single unmarried person.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Eighteen (18), Block Three (3), DEVONSHIRE PLACE FOURTH, an Addition to the Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on October 21, 1991, the Defendant, MARY ANNE DAY, executed and delivered to Mercury Mortgage Co., Inc., a corporation, her mortgage note in the amount of \$23,666.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, MARY ANNE DAY, executed and delivered to Mercury Mortgage Co., Inc., a corporation, a mortgage dated October 21, 1991, covering the above-described property. Said mortgage was recorded on October 23, 1991, in Book 5357, Page 689, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 27, 1993, MERCURY MORTGAGE CO., INC., a corporation, assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 28, 1993, in Book 5496, Page 2652, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 1, 1993, the Defendant, MARY ANNE DAY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on July 1, 1993 and January 1, 1994.

The Court further finds that the Defendant, MARY ANNE DAY, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, MARY ANNE DAY, is indebted to the Plaintiff in the principal sum of \$27,454.94, plus interest at the rate of 9 percent per annum from June 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, JOHN MUETZEL dba C&G Laundry and C&G Corporation, has a lien on the property which is the subject matter of this action by virtue of a judgment, in the amount of \$784.78, plus interest at the legal rate from July 8, 1992, which became a lien on the property as of March 8, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, MARY ANNE DAY, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, MARY ANNE DAY, in the principal sum of \$27,454.94, plus interest at the rate of Nine percent per annum from June 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.16 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, JOHN MUETZEL dba C&G Laundry and C&G Corporation, have and recover judgment in the amount of \$784.78, plus interest at the legal rate from July 8, 1992, for its judgment, plus the costs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa

County, Oklahoma, and MARY ANNE DAY, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, MARY ANNE DAY, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of Defendant, JOHN MUETZEL dba C&G Laundry and C&G Corporation, in the amount of \$784.78, plus interest at the legal rate from July 8, 1992, for judgment.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

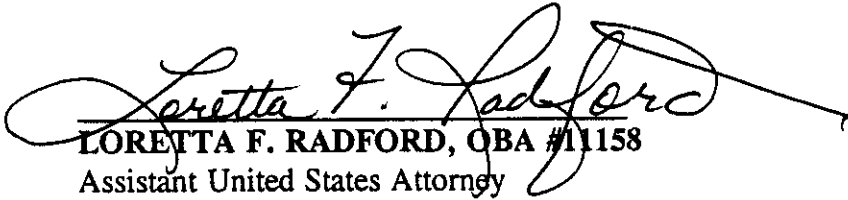
**s/ MICHAEL BURRAGE**

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UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



**DICK A. BLAKELEY, OBA #852**

Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma



**THOMAS A. LEBLANC, OBA #14768**

2727 East 21st Street  
Suite 500  
Tulsa, OK 74114  
Attorney for Defendant,  
John Muetzel dba C&G Laundry and  
C&G Corporation

Judgment of Foreclosure  
Civil Action No. 95 C 983BU

LFR:flv

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 29 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

RICKY OSCAR WILLIAMS,

Plaintiff,

vs.

LARRY FIELDS, et al.,

Defendants.

No. 95-C-1034-B ✓

ENTERED ON DOCKET

DATE JAN 30 1996

ORDER

On January 4, 1996, the Clerk notified Plaintiff that a motion for leave to proceed in forma pauperis had not been tendered in lieu of required filing fee and granted him twenty days to do so. As of the date of this order, Plaintiff has yet to submit a motion for leave to proceed in forma pauperis or the \$120.00 filing fee.

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE for failure to pay the filing fee. See Local Rule 5.1.F.

SO ORDERED THIS 29 day of Jan, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

(2)

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**JAN 30 1996**

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONALD D. SMITH; MARGARETHE  
SMITH; PATRICIA A. SHINDLER;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Civil Case No. 95-C 539K

Defendants.

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 26 day of Jan,  
1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern  
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the  
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY  
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant  
District Attorney, Tulsa County, Oklahoma; and the Defendants, RONALD D. SMITH,  
MARGARETHE E. SMITH, and PATRICIA A. SHINDLER, appear not, but make default.

The Court being fully advised and having examined the court file finds that the  
Defendants, RONALD D. SMITH and MARGARETHE E. SMITH, are husband and wife.

The Court being fully advised and having examined the court file finds that the  
Defendant, RONALD D. SMITH, acknowledged receipt of Summons and Complaint via  
certified mail on September 12, 1995; and that the Defendant, MARGARETHE E. SMITH,  
acknowledged receipt of Summons and Complaint via certified mail on September 16, 1995.

NOTE: THIS CASE IS FILED  
BY THE CLERK OF COURT AND  
NOT BY THE ATTORNEY  
UPON RECEIPT.



The Court further finds that the Defendant, PATRICIA A. SHINDLER, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 27, 1995, and continuing through December 1, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, PATRICIA A. SHINDLER, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, PATRICIA A. SHINDLER. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on June 27, 1995; and that the Defendants, RONALD D. SMITH, MARGARETHE E. SMITH, and PATRICIA A. SHINDLER, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

The North 71.5 feet of the South 631.5 feet of the East 149.75 feet of the West 615 feet of the Southwest Quarter of the Northwest Quarter (SW/4 NW/4) of Section 16, Township 19 North, Range 14 East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the U.S. Government Survey thereof.

The Court further finds that on October 27, 1980, Basil Pelton and Jami Rinehart, executed and delivered to MIDLAND MORTGAGE CO. their mortgage note in the amount of \$51,300.00, payable in monthly installments, with interest thereon at the rate of thirteen percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, Basil Pelton, a Single Person and Jami Rinehart, a Single Person,, executed and delivered to MIDLAND MORTGAGE CO. a mortgage dated October 27, 1980, covering the above-described property. Said mortgage was recorded on November 3, 1980, in Book 4508, Page 602, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 28, 1990, Midland Mortgage Co. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C. his successors and assigns. This Assignment of Mortgage was recorded on September 5, 1990, in Book 5274, Page 2183, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, RONALD D. SMITH and MARGARETHE E. SMITH, currently hold the record title to he property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on July 1, 1991, the Defendants, RONALD D. SMITH and MARGARETHE E. SMITH, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on September 1, 1990.

The Court further finds that the Defendants, RONALD D. SMITH and MARGARETHE E. SMITH, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, RONALD D. SMITH and MARGARETHE E. SMITH, are indebted to the Plaintiff in the principal sum of \$79,458.42, plus interest at the rate of 13 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by

virtue of personal property taxes in the amount of \$10.00 which became a lien on the property as of July 5, 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, RONALD D. SMITH, MARGARETHE E. SMITH, and PATRICIA A. SHINDLER, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, RONALD D. SMITH and MARGARETHE E. SMITH, in the principal sum of \$79,458.42, plus interest at the rate of 13 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.16 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment

in the amount of \$10.00, plus costs and interest, for personal property taxes for the year 1988, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, RONALD D. SMITH, MARGARETHE E. SMITH, PATRICIA A. SHINDLER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, RONALD D. SMITH and MARGARETHE E. SMITH, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

**Third:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$10.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

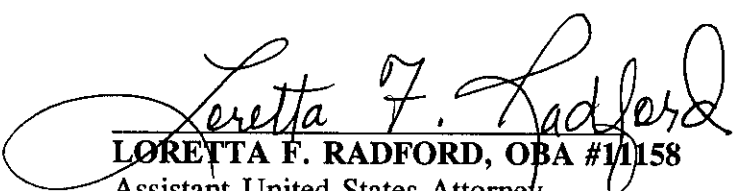
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

**s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
DICK A. BLAKELEY, OBA #852

Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842

Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95-C 539K

LFR/lg

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED  
JAN 29 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

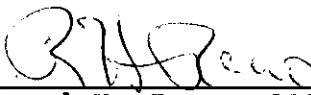
TWILA ROSE, an individual,  
Plaintiff,  
vs.  
AUTEX FOODS, INC.  
Defendant.


Case No. 95-C-665-E

ENTERED ON DOCKET  
DATE JAN 30 1996

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW, the Plaintiff, Twila Rose, and the Defendant, Autex Foods, Inc. and hereby jointly stipulate and agree, pursuant to Fed.R.Civ.P.41(a)(1)(ii), that this cause may be dismissed with prejudice, each party to bear its own costs and attorney's fees.

  
Richard H. Reno OBA # 10454  
Bufogle & Associates  
Attorneys at Law  
5110 S. Yale Ave., #400  
Tulsa, Oklahoma 74135  
(918) 488-9874

  
Gentner Drummond #16645  
Boone, Smith, Davis & Hurst  
Attorneys at Law  
500 ONEOK Plaza  
Tulsa, OK 74103  
(918) 587-0000

rose.twi\joint.stp



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

REGINA CORK,  
SSN: 527-86-5607,

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner, Social Security  
Administration,  
Defendant.

NO. 94-C-676-M

**FILED**

JAN 29 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON 00-1996  
DATE JAN 30 1996

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 29<sup>th</sup> day  
of JAN., 1996.

Frank H. McCarthy  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DURENDA ESTRADA,

Plaintiff,

v.

UNITED STATES POSTMASTER  
GENERAL,

Defendant.

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Case No. 95-C-0107-B

ENTERED ON DOCKET  
DATE JAN 30 1996

ORDER


This matter comes on before the court upon the stipulation of all parties and the court being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, Durenda Estrada, against the United States Postal Service are hereby dismissed with prejudice.

Dated this 29 day of Jan, 1996.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:

  
CATHRYN MCCLANAHAN, OBA#14853  
ASSISTANT U.S. ATTORNEY  
333 West 4th Street, Suite 3460  
Tulsa, OK 74103-3809  
(918) 581-7463

**SANDRA WALTON BOWENS**  
**Regional Counsel**  
**United States Postal Service**  
**Law Department, Southern Division**  
**225 N. Humphreys Blvd.**  
**Memphis, TN 38166-0170**

*Katherine T. Waller*  
**KATHERINE T. WALLER, OBA#15051**  
**LEBLANG & CLAY**  
**7666 E. 61st Street, Suite 251**  
**Tulsa, OK 74133**  
**(918) 254-1414**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 29 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

TOMMY ROGERS,

Plaintiff,

vs.

"JOHN DOE" OFFICER DUPREE,  
and STANLEY GLANZ,

Defendants.

No. 94-C-476-B

ENTERED ON DOCKET

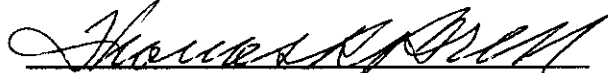
DATE JAN 30 1996

ORDER

This matter comes before the Court on the Join Motion for Order Approving Stipulation of Dismissal.

Accordingly, the Join Motion (docket #26) is GRANTED and this action is hereby DISMISSED WITH PREJUDICE.

SO ORDERED THIS 29 day of Jan, 1996.

  
THOMAS R. BRETT, Chief Judge  
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 26 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MARKIE GARNER,

Plaintiff,

vs.

No. 95-CV-36-BU

LARRY FIELDS, et al.,

Defendants.

ENTERED ON DOCKET

DATE JAN 29 1996

ORDER

Plaintiff Markie Garner, a state prisoner appearing pro se, brings this action pursuant to 42 U.S.C. § 1983, against Larry Fields, Director of the Oklahoma Department of Corrections (DOC), Anita Trammel, senior case manager at Mack Alford Correctional Center (MACC), Ervin Pool, case manager at MACC, and Jim Wallace, Unit Manger at MACC. Plaintiff alleges violation of the Eighth Amendment prohibition against cruel and unusual punishment as a result of Defendants' failure to protect him from an alleged homosexual rape by his cellmate and denial of medical care following the rape. He seeks \$300,000 in damages and an order directing his release from custody, barring future confinement in any penitentiary, and directing the DOC to pay for psychiatric treatment.

Defendants have moved for summary judgment on the basis of the court-ordered Martinez report. See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Worley v. Sharp, 724 F.2d 862 (10th Cir. 1983). Plaintiff has objected and filed a cross motion for summary judgment. For the reasons stated below, Defendants' motion for summary judgment should be granted.

## I. BACKGROUND

The following facts are undisputed.

1. On November 16, 1993, Plaintiff informed James Crabtree Correctional Center (JCCC) that six inmates had threatened him with bodily harm. He was placed in restrictive housing unit (RHU) pending investigation. On November 24, 1993, prison officials recommended Plaintiff for protective-custody transfer and Plaintiff was transferred to Dick Conners Correctional Center (DCCC) on December 3, 1993. (Attachments B, C, D, and E.)

2. On April 18, 1994, Plaintiff informed DCCC staff that his life had been threatened by several inmates and he was placed in RHU because he feared for his life. On the same date, prison officials recommended Plaintiff for a protective-custody transfer and Plaintiff was transferred to MACC on April 29, 1994. (Attachments F, G, H, J.)

3. Plaintiff was assigned to more than one cell during the first weeks at MACC. (Attachment K.)

4. On June 28, 1994, Plaintiff requested protective custody because his cellmate, inmate Glenn Folsum, had raped him the night before. Prison officials recommended Plaintiff for a transfer to a another medium security facility. On the same day, T.Q. Pham, M.D., examined Plaintiff for forcible rape, but no trauma or lesions were noted. (Attachments N, O, P, and U.)

5. On June 30, 1994, Plaintiff was transferred to Lexington Correctional Center (LCC). (Attachment P.)

## II. STANDARD

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most

favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

### III. ANALYSIS

#### A. Failure to Protect

Inmates have a right to be reasonably protected from threats of violence and attacks by other inmates. See Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Deliberate indifference on the part of corrections officials to inmate safety and the probability of violent attacks violates a



convicted prisoner's Eighth Amendment rights. Berry v. City of Muskogee, 900 F.2d 1489, 1494-95 (10th Cir. 1990). Under the deliberate indifference standard, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that [an] inmate[] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 114 S.Ct. 1970, 1984 (1994); see also MacKay v. Farnsworth, 48 F.3d 491, 493 (10th Cir. 1995) (the requisite mental state is that of deliberate indifference). The Court in Farmer went on to note that an official's "failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be considered as the infliction of punishment." Farmer, 114 S.Ct. at 1979.

The Seventh Circuit Court of Appeals recently explained deliberate indifference to inmates' safety as follows:

If [prison employees] place a prisoner in a cell that has a cobra, but they do not know that there is a cobra there (or even that there is a high probability that there is a cobra there), they are not guilty of deliberate indifference even if they should have known about the risk, that is, even if they were negligent--even grossly negligent or even reckless in the tort sense--in failing to know. But if they know that there is a cobra there or at least that there is a high probability of a cobra there, and do nothing, that is deliberate indifference.

Billman v. Indiana Dept. of Corrections, 56 F.3d 785, 788 (7th Cir. 1995).

In the instant case, Plaintiff has not shown that Defendants knew he was in danger of an attack by inmate Folsum. Plaintiff requested protective custody from inmate Folsum only after the June

27, 1994 rape.<sup>1</sup> Moreover, none of his prior requests for protective custody at JDCC, DCCC, and MACC, and relocations within MACC involved inmate Folsum.<sup>2</sup> But see Smith v. Ullman, 874 F.Supp. 979, 985-987 (D. Neb. 1994) (noting problems with "specific notice" requirement). Therefore, Plaintiff has not presented any fact showing that Defendants disregarded a serious risk of harm of which they were aware or that the risk was blatantly obvious. Farmer, 114 S.Ct. at 1984. Accordingly, Defendants' motion for summary judgment must be granted as to Plaintiff's failure to protect claim.

#### **B. Medical Care**

In Count II of the complaint, Plaintiff alleges Defendants were "deliberate[ly] indifferen[t] toward the Plaintiff's medical needs." (Complaint, docket #1, at 3.) Twenty days after the filing of the complaint and one day after the filing of the order granting leave to proceed in forma pauperis, Plaintiff submitted a "Supplement[al] Brief to [Show] How the Defendants are involved."

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<sup>1</sup> While there remains an issue of fact as to whether Plaintiff requested to be assigned to the same cell as inmate Folsum, the Court finds there is sufficient summary judgment evidence to rule in Defendants' favor.

<sup>2</sup> In his Motion to Strike Defendants' Motion to Dismiss/Summary Judgment, filed on April 5, 1995, Plaintiff contends for the first time that he requested protective custody at MACC prior to the June 27, 1994 rape due to threats received from inmates which Plaintiff knew while at JDCC and DCCC. (Docket #10 at 3.) Even if Plaintiff had verified the above statement, this request for protective custody did not involve inmate Folsum and, therefore, could not have put Defendants on notice about the specific risk of harm posed by Folsum.

(Docket #5.) The Clerk of the Court filed and docketed the brief although Plaintiff had not sought leave to amend the complaint and the brief did not contain a certificate of service. In the brief, Plaintiff alleges he requested psychological services following the rape on several occasions, but the DOC denied all of his requests.<sup>3</sup> Attached to the brief is a "Request to Staff Member," dated December 16, 1994, requesting Dr. Little to state in writing that the DOC is unable to provide psychological treatment. The Special Report does not address whether Plaintiff was denied psychological services.

Due to Plaintiff's failure to plead denial of psychological services in his original complaint and the need for a new investigation and special report, the Court dismisses Count II of the complaint without prejudice to it being reasserted in a separate civil rights action. Plaintiff is reminded, however, that any new action should be filed before June 27, 1996. See Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988) (the applicable statute of limitations for civil rights action is the two-year limitations period for "an action for injury to the rights of another" under Oklahoma state law).

#### IV. CONCLUSION

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendants are entitled to

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<sup>3</sup> Plaintiff's brief is not properly verified. Cf. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991).

judgment as a matter of law on Plaintiff's failure to protect claim. Accordingly, Defendant's motion for summary judgment (doc. #11) is GRANTED and Plaintiff's motion (docket #13) is DENIED. Plaintiff's medical care claim is DISMISSED WITHOUT PREJUDICE to it being reasserted in a separate civil rights action. The Clerk shall MAIL to Plaintiff information/instructions and blank forms for filing a civil rights action.

SO ORDERED THIS 26<sup>th</sup> day of January, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

REGINA CORK,  
SSN: 527-86-5607,

Plaintiff,

v.

SHIRLEY S. CHATER,<sup>1</sup>  
Commissioner, Social Security  
Administration,  
Defendant.

NO. 94-C-676-M

ENTERED ON DOCKET

DATE JAN 29 1996

FILED

JAN 26 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ORDER

Plaintiff, Regina Cork, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security benefits.<sup>2</sup> In accordance with 28 U.S.C. §636(c) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of*

<sup>1</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-297. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

<sup>2</sup> Ms. Cork first filed for SSI and disability benefits in September, 1989 which were denied. She took no further action on those applications. On December 4, 1990, she filed new applications for disability benefits and supplemental security income benefits which were denied April 5, 1991. The denials were affirmed on reconsideration on July 15, 1991. A hearing before an Administrative Law Judge was held May 13, 1992. The Decision of the ALJ denying benefits, dated July 17, 1992, was remanded by the Appeals Council on February 24, 1993 for supplemental hearing, evaluation of treating mental health professional opinion, for determining whether Plaintiff's "court ordered community service" work activity constituted relevant past work and for obtaining supplemental evidence from a vocational expert. The supplemental hearing was conducted on July 23, 1993. On September 30, 1993, the ALJ entered his Decision, the findings of which are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 3, 1994. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

21

*Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The entire record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. The Court finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the facts and the regulatory sequential evaluation process applicable to this case. The Court therefore incorporates that information into this order as the duplication of this effort would serve no useful purpose.

Regina Cork, born November 4, 1949, claims disability arising from depression and a personality disorder which commenced on June 30, 1987. Plaintiff asserts an inability to attain and maintain substantial gainful employment due to depression, anxiety and panic attacks [R. 55, 142, 177, 185, 187, 189]. There is no evidence in the record that Plaintiff has worked since her alleged disability onset date of October 15, 1987 [R. 107].

The ALJ determined that Ms. Cork has the residual functional capacity to perform the nonexertional requirements of work except for performing tasks requiring a lot of interaction with the public and that she has no exertional limitations. He decided that Plaintiff was unable to perform her past relevant work as a fast food manager, manager of a food service company,

waitress and warehouse supervisor [R. 16-28], but that she is functionally capable of performing types of work which exist in significant numbers in the national economy. The ALJ's decision, therefore, was that Plaintiff is not under a disability, as defined in 20 CFR 404.1520(f) and 416.920(f).

Plaintiff alleges that the ALJ improperly rejected the opinion of her treating physician, that the ALJ failed to pose a proper hypothetical to the vocational expert, and that the record does not support the determination of the Secretary by substantial evidence. Plaintiff further asserts that her previous applications for 1989 should be reopened.

#### **TREATING PHYSICIAN'S OPINION**

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Secretary will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. §§ 404.1527(d)(2), 416.927(d)(2). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. Specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ. *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987). And, while a physician may proffer an opinion that a claimant is totally disabled, that opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. See 20 C.F. R. §§ 404.1527(e)(2), 416.927(e)(2); *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027, 1028 (10th Cir. 1994), *Eggleston v. Bowen*, 851 F.2d 1244, 1246-7 (10th Cir. 1988) (if

treating physician's progress notes contradict his opinion, it may be rejected).

Plaintiff asserts that it was the opinion of Plaintiff's treating doctor and her counselor that she could not hold a job on a sustained basis. The treating physician's opinion at issue in this case consists of a "Mental Status Report" signed by both Georgene Dwyer, B.S., Volunteer Therapist, and Robert S. Glen, M.D., dated April 2, 1991 [R. 277-278]. The report followed an examination of Plaintiff on March 18, 1991. Plaintiff relies upon the following passage from the report for her assertion:

Can the claimant: (a) remember, comprehend and carry out (simple) (complex) instructions on an independent basis, (b) respond to work pressure, supervision and co-workers?  
(a) Yes.  
(b) Not for an ongoing period.

The remainder of the report indicated that in all other respects, Plaintiff's mental status was good: "Immediate and remote memory good...appears alert...good eye contact...oriented to time and place..." [R. 277]. Dwyer and Glen were, at the time of the report, among the practitioners treating Plaintiff at the Mental Healthcare Services Center in Tulsa, Oklahoma. When the report was written, Plaintiff had been undergoing intermittent individual counseling and some group therapy sessions for seven months<sup>3</sup>. In the treatment notes by Dwyer just two weeks prior to the examination upon which the Dwyer/Glen report was based, the therapist noted that Plaintiff's "[m]edication is continuing to alleviate symptoms of depression, [decreased] panic attacks after first few days after being released from jail" [R. 279]. On April 15, 1991, less than one month after the examination, a physician noted that Plaintiff's "community service is not

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<sup>3</sup> Plaintiff was seen for initial examination and assessment on September 13, 1990 and had irregular appointments with the psychiatrist and therapist through October and November, 1990. Her treatment was interrupted by an arrest for marijuana possession in January, 1991. She spent approximately one month in the county jail and was ordered to perform 500 hours of community service. Her treatment at the Center resumed in March, 1991.



overwhelming" [R. 276]. Then, just two weeks later, on the same page of treatment notes, appears a report that Plaintiff had been referred to the Tulsa Area Agency on Aging and Tulsa Senior Services "for possible work as a volunteer with elderly individuals" [R. 276]. This evidence, by the same medical treatment providers, is in direct conflict with the assertion that Plaintiff could not hold a job. Although the Secretary must give substantial weight to the treating physician's opinion, *Sorenson v. Bowen*, 888 F.2d 706 (10th Cir. 1989), the ultimate determination whether a claimant is disabled is reserved to the Secretary, *Castellano, supra., at 1029*. When office notes are inconsistent or contradict a treating physician's report, the ALJ may reject the treating physician's opinion. See *Castellano, id.*; *Eggleston, supra.*; and 20 C.F.R. 416.927(d)(2).

Georgene Dwyer appeared on Plaintiff's behalf at the initial hearing before the ALJ on May 13, 1992 [R. 64-68]. When asked her opinion of Plaintiff's ability to function in a work setting, Dwyer responded: "I would say it would be very variable from day to day...[e]motionally I think that she would -- some days be able to handle that. Some days I think she's probably going in and not be able to get along with people" [R. 65]. Dwyer testified that while she had not seen it in her office, she had heard descriptions of Plaintiff "throwing temper fits, angry, out of control" [R. 66]. Treatment notes from the week before the hearing, report that Plaintiff was considering doing volunteer work before pursuing competitive employment but wanted to wait until after the social security appeal hearing to do so [R. 371]. And, on June 2, 1992, treatment notes reveal that Plaintiff was seeking part-time volunteer work [R. 369].

Plaintiff continued treatment at the Mental Healthcare Services Center through the end

of 1994, under the care of several therapists and doctors [R. 269-314, 323-333, 357-373, 389-445]<sup>4</sup> The treatment records from the Mental Health Services Center for the time period April 9, 1992 through June 25, 1993 are signed by Vickie Mackey, M.S., Therapist, and David McElwain, M.D. [R. 328-398]. During that time period, notations by doctors and therapists indicate that Plaintiff appeared regularly, at least once a week, for her occupational and socialization therapy sessions and appointments with the doctors. She was reported to be working on moccasins [R. 397-399], ceramics projects [R. 390] was reported to be socializing with staff and peers [R. 399] and had a "bright effect" [R. 443-441]. Dr. McElwain reported on April 9, 1992, that the medication prescribed, Imipramine, had dramatic effect on Plaintiff's depression, that she was having very few mild panic attacks, she was sleeping well and there was no evidence of depression even with decreased dosage [R. 328]. On January 18, 1993, Dr. McElwain noted that Plaintiff had shown good response to increasing medication, that she was less anxious and that panic attacks were less severe and less frequent [R. 402]. In February and March, 1993, Dr. McElwain reported that Plaintiff continued to improve and that she was doing better and better [R. 395, 398]. On May 14, 1993, Dr. McElwain wrote that Plaintiff was doing okay and that she rarely had true panic attacks with only occasional anxiety [R. 392]. His note on June 25, 1993 stated that Plaintiff was doing pretty well in spite of the recent loss of a severely ill friend [R. 390].

It was these reports and notes by additional treating physicians and therapists that the ALJ balanced against the report and testimony of Dwyer and Glen. Plaintiff had continued treatment between the May 13, 1992 and the July 23, 1993 hearings. Dwyer had testified at the earlier

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<sup>4</sup> *Mental Healthcare Services, Inc., changed to Parkside sometime in 1992.*

hearing that her ability to function in a work setting would be "variable". The Glen/Dwyer report had been written on April 2, 1991. The ALJ weighed this evidence against later, updated medical evidence from October, 1992 through June, 1993, which revealed that her condition had improved and was controlled with medication. When an impairment can be reasonably controlled with medication or is reasonably amenable to treatment, it cannot serve as a basis for a finding of disability. See Pacheco v. Sullivan, 931 F.2d 695, 698 (10th Cir. 1991); Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985); 20 C.F.R. § 404.1530.

In addition, Dr. Goodman, the psychiatrist who testified at both hearings as a medical adviser, noted that "all the comments by psychiatrists have said that she does not look clinically depressed", that if Plaintiff "wants to she can force herself to get up", that she performed the community service ordered by the court and that she has not met the criteria for a "listing" [R. 73-74].

The Court finds that the ALJ's reasons for rejecting the former treating physician and therapist's opinion are supported by substantial evidence.

Plaintiff has presented a letter from the Tulsa County Work Program, dated March 17, 1992, signed by an Operations Supervisor which states:

To Whom It May Concern:

Regina Lerch [Cork] is a competent worker when she is at work, but due to her emotional problems she is not always able to work her two (2) scheduled days per week.

[R. 334]. There is no documentation in the medical records, however, indicating that Plaintiff was unable to work her scheduled two days per week due to depression and panic attacks. In fact, the record indicates the opposite. Medical evidence contained in the record revealed that Plaintiff was able to appear regularly for scheduled appointments, having missed only two

appointments out of a year, in August, 1993, when her mother was visiting [R. 439]. The records evidence Plaintiff's ability to read instructions on occupational therapy projects and to proceed on her own [R. 365], to work on projects to completion and to socialize with others [R. 390-443]. She was recorded as being able to comprehend what she was reading [R. 366, 373], being able to stay focused on tasks, to remember a plan and requiring minimal direction [369], giving attention to the task at hand [R. 371]. She demonstrated an excellent ability to concentrate in crafts and work carefully [R. 429]. In April, 1992, the Occupational Therapist wrote a positive assessment of Plaintiff's daily living skills [R. 325]. The record also establishes that Plaintiff no longer engages in substance-abuse behavior [R. 438]. Although Plaintiff continued to complain of depression and panic attacks, the record contains evidence that both conditions are controlled with medication [R. 328, 395, 390, 392, 398, 402, 435]. Plaintiff was able to complete the community service hours required by her probation [R. 63-64, 306]. The Court notes that Plaintiff testified that it took her a year to get that done. The medical records reveal, however, that during that year, Plaintiff went out-of-town [R. 299-300] and was having problems with her boyfriend [R. 273-275]. Finally, as noted by the ALJ, there is no medical evidence to support Plaintiff's allegation of "job interview panic" as such condition is never mentioned by her medical care providers and no treatment for such condition was sought or given.

The Court finds that the ALJ properly evaluated the record and considered the nonexertional limitations asserted by Plaintiff in accordance with the correct legal standards established by the Secretary and the courts.

## ASSESSMENT OF MENTAL CONDITION

The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. §1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas<sup>5</sup>. If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. See 20 C.F.R. §1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. §1520a(d).

In this case, with respect to Plaintiff's mental functional limitations, the ALJ determined:

- (1) Restrictions of Activities of Daily Living -- slight;
- (2) Difficulties in Maintaining Social Functioning -- Marked;
- (3) Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere) -- Seldom;
- (4) Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptoms (which may Include Deterioration of Adaptive Behaviors) -- Never.

[R. 32]. The ALJ concluded that although Plaintiff has severe mental problems, including depression, anxiety, a personality disorder, and a history of substance abuse, she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4 [R. 27]. The Court finds that the ALJ's findings are supported by substantial evidence.

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<sup>5</sup> The four areas are: (1) activities of daily living' (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. §1520a(b)(3).

## QUESTIONING OF VOCATIONAL EXPERT

Plaintiff complains that the ALJ did not pose a proper hypothetical to the vocational expert at the hearing. In posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). Contrary to Plaintiff's assertion, the hypothetical posed to the vocational expert at the July 23, 1993 hearing included the limitation as to active involvement with the public. The vocational expert testified as to a substantial number of jobs in the U.S. economy available to Plaintiff, taking into account her limitations. Accordingly, the Court finds the ALJ's conclusion based on the vocational expert's testimony is supported by substantial evidence.

## REOPENING OF PLAINTIFF'S 1989 APPLICATIONS

The remaining issue is whether a de facto reopening occurred. It is well-established that a de facto reopening of a previous application is subject to judicial review. *Taylor for Peck v. Heckler*, 738 F.2d 1112, 1115 (10th Cir. 1984). A de facto reopening occurs when an ALJ considers the merits of a previous application and reappraises the evidence without deciding the administrative res judicata issue. *Taylor*, 738 F.2d at 1114. However, the previous application is not considered to be reopened if the ALJ merely reviews previously submitted evidence as background information and does not reappraise the evidence. *Frustaglia v. Secretary of Health and Human Services*, 829 F.2d 192, 193 (1st Cir. 1987); *Burks-Marshall v. Shalala*, 7 F.3d 1346, 1348 (8th Cir. 1993). As the Eighth Circuit explained in *Burks-Marshall*, "[t]reating any admission of evidence from prior claims as a waiver of the [Commissioner's] power not to reopen, as the claimant apparently suggests, would not be in the best interest of claimants. Such

a rule might cause Administrative Law Judges to resist the admission of evidence potentially advantageous to claimants." *Id.* at 1348.

The ALJ's decision does not mention Plaintiff's 1989 applications. And, although some medical records pre-dating the 1989 application are included in the record and the Plaintiff's pre-1989 condition is mentioned by the medical expert during the first hearing, the ALJ's decision refers only to Plaintiff's pre-1989 condition during his discussion of Plaintiff's medical history [R. 18]. There were no arguments presented to the ALJ at the hearing concerning any reopening of the previous application. There is nothing in the record to suggest that the ALJ reappraised the merits of Plaintiff's earlier application. The Court finds that a de facto reopening did not occur. Consequently, this case does not fall within the district court's jurisdiction to review Social Security appeals. 42 U.S.C. § 405(g); *Califano v. Sanders*, supra.

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the undersigned United States Magistrate Judge ORDERS that the decision of the Secretary finding Plaintiff not disabled be AFFIRMED.

DATED THIS 26<sup>th</sup> DAY OF January, 1996.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 26 1996

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

TERENCE WOOD,

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of Social Security,<sup>2</sup>

Defendant.

Case No: 93-C-877-W

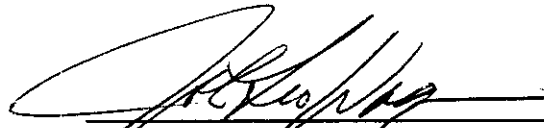
ENTERED ON DOCKET

DATE JAN 29 1996

JUDGMENT

Judgment is entered in favor of the Plaintiff, Terence Wood, in accordance with this court's Order filed January 18, 1996.

Dated this 25<sup>th</sup> day of January, 1996.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

<sup>2</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JAN 26 1996

SANDRA K. BILBREY,

Plaintiff,

v.

SHIRLEY CHATER, Commissioner of the  
Social Security Administration,

Defendant.

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JAN 29 1996

CASE NO. 94-C-517-W

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, to which there is no objection, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further evaluation pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), sentence four.

DATED this 25<sup>th</sup> day of January, 1996.

/s/ JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney



PHIL PINNELL, OBA #7169  
Assistant United States Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103-3809

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 26 1996

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

LARRY A. FRANKLIN,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER  
OF SOCIAL SECURITY,<sup>1</sup>

Defendant.

Case No. 94-C-919-W

ENTERED ON DOCKET

DATE JAN 29 1996

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of United States Administrative Law Judge John M. Slater ("ALJ"), which summaries are incorporated herein by reference.

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<sup>1</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.<sup>2</sup>

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.<sup>3</sup> He found that claimant had the residual functional capacity to perform the physical exertion requirements of work, except that claimant's capacity did not include the ability to do work involving average or above average intelligence. (TR 54). He concluded that claimant was able to perform his past relevant work as a dishwasher and car washer despite his mental/nonexertional impairment. Having determined that claimant's impairment did not prevent him from performing his past relevant work, the ALJ

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<sup>2</sup> Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

<sup>3</sup> The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ's decision is not supported by substantial evidence because he improperly assessed claimant's residual functional capacity by failing to (a) consider the severity of his impairment since it met the requirement of Listing 12.05(c); and (b) consider the severity of all his impairments in combination.
- (2) The ALJ failed to analyze steps 4 and 5 of the sequential evaluation process.
- (3) The ALJ improperly rejected lay testimony of claimant's family concerning his limited ability to perform basic work activities.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant, a fifty year old man, suffers from mental retardation. He cannot read or write. (TR 80). He alleged that he became disabled on December 30, 1991, due to his mental retardation. (TR 104). After being hospitalized in August of 1992, he also claimed disability due to polycystic kidney and liver disease, resulting in cysts in his kidneys, bladder, liver, and pancreas and decreased kidney function and bleeding from both kidneys. (TR 120, 174). He claimed on March 23, 1993, that being retarded and having to function in a normal world led to a great deal of stress which caused kidney malfunction and high blood pressure. (TR 180).

Claimant was hospitalized after a fall on August 11, 1992, when he fractured his coccyx and developed left flank and back pain and marked gross hematuria (TR 187-197).

He was examined by Dr. Richard Saint and Dr. Richard Medlock, specialists in internal medicine and nephrology. After extensive laboratory tests, including an intravenous pyelogram, CT scan of the abdomen, chest x-rays, and urine and blood testing, he was treated with antibiotics with good response and discharged from the hospital with a final diagnoses of adult polycystic kidney and liver disease, renal insufficiency, and febrile urinary tract infection. (TR 187-197). Dr. Saint noted on January 6, 1993, that claimant had been feeling well, voiding without pain or difficulty, and had no recurrence of flank pain or hematuria. (TR 199). He referred the claimant to Dr. Medlock to determine whether or not he should take antihypertensive medications (TR 199).

Claimant was seen five times in 1993 by Dr. Medlock and, with the exception of elevated blood pressure, physical examinations were entirely unremarkable (TR 205-210). He was placed on antihypertensive medication on January 12, 1993, and by March 22, 1993, his blood pressure was 132/92. (TR 205). He had no subjective complaints of pain at any time from January 12, 1993 until December 18, 1993, when he complained of some intermittent pain in his abdomen and back. (TR 209, 224). At that time his blood pressure was elevated, but the examination showed no other problems. (TR 224). Dr. Medlock specifically noted claimant was "trying to get Social Security Disability." (TR 224).

When claimant saw Dr. Medlock on December 28, 1993, he was reported to be doing well and had no complaints (TR 226). His blood pressure was 130/80 and no other problems were found with the exception of the fact that his kidneys were palpable bilaterally. (TR 226). When he was last seen by Dr. Medlock on January 27, 1994, he

had no complaints, although he had broken his left arm the previous Saturday and his blood pressure was high. (TR 228).

The ALJ noted that polycystic disease is slowly progressive and distinguishable from solitary or multiple cysts of the kidneys that do not cause uremia. (TR 48). The ALJ also noted that claimant had had only one episode of hematuria in August of 1992 and complained only once after that of abdomen and back pain, in December of 1993. (TR 48).

A consultative examiner, Dr. Joseph Sutton, concluded on December 27, 1993 that claimant had hypertension and was taking medications for it, showed decreased breath sounds, and had multiple palpable masses in his abdomen felt to be secondary to polycystic kidneys. (TR 213). The claimant demonstrated essentially normal range of motion of all joints, good grip strength, bilaterally, and intact reflexes. (TR 213). The doctor concluded that claimant had polycystic kidneys without symptoms at the present time, hypertension, mild mental retardation, and chronic obstruction pulmonary disease. (TR 213-214). He also concluded that claimant could sit, stand, or walk for 8 hours in an 8 hour day, continuously lift and carry up to 100 pounds, and continuously bend, squat, crawl, climb, and reach, and had no restrictions on the ability to use his hands or feet, could be exposed to pollution or changes in humidity, and had intact ability to be around moving machinery or work at unprotected heights. (TR 215-216).

Claimant's contention that the ALJ improperly assessed his residual functional capacity by failing to consider the severity of his impairment since it met the requirement of Listing 12.05(C) is without merit. In determining that claimant's impairment did not

meet or medically equal an impairment in Listing 12.05, the ALJ relied, in part, upon the absence of such a finding by two state agency physicians. (TR 50). If a finding of disability had been made by either agency physician, benefits for claimant would have been approved and the administrative process complete. (TR 50). The ALJ specifically compared claimant's impairments to Listings 12.05(C) and (D) and properly concluded that no medical evidence supported a finding that his impairment met or equalled the requirements of those Listings, which pertain to "mental retardation and autism." (TR 50-51).<sup>4</sup>

Although claimant satisfied the IQ requirement for Listing 12.05(C) with a verbal IQ score of sixty-five and a full scale IQ score of sixty-six (TR 185), he did not exhibit "a physical or other mental impairment imposing additional and significant work-related limitation of function." 20 C.F.R. § 404, Subpt. P, App. 1, Listing 12.05(C). As already

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"Mental retardation" is defined in the Listing as "a significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested . . . before age 22 . . . . The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied....

- C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function; OR
- D. A valid verbal, performance, or full scale IQ of 60 through 70...resulting in two of the following:
  - 1. Marked restriction of activities of daily living; or
  - 2. Marked difficulties in maintaining social functioning; or
  - 3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or
  - 4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors."

20 C.F.R. § 404, Subpt. P, App. 1, Section 12.05.

discussed, in January of 1993, Dr. Medlock stated that claimant's physical condition involved adult polycystic kidney disease, borderline hypertension, and a history of urinary tract infection, but he was feeling well, had no flank pain or hematuria, and was voiding without difficulty or pain. (TR 199). In December of that year, Dr. Sutton reported that, in addition to his mild mental retardation, claimant had polycystic kidneys without current symptoms, hypertension, and chronic obstructive pulmonary disease. (TR 213-14). In a RFC evaluation completed by Dr. Sutton on that date, claimant's sole limitation was that he could only stand or walk for a total of four hours at one time. (TR 215-17). Substantial evidence supports the ALJ's determination that these physical impairments, singularly or in combination, would not in any way effect claimant's ability to engage in work-related functions as required in Listing 12.05(C).

Claimant also satisfied the IQ requirement of Listing 12.05(D) with verbal and full scale IQ scores in the sixty to seventy range, but three psychiatric review examinations conducted on September 16, 1992, February 19, 1993, and March 29, 1994 showed that he did not meet the degree of limitation necessary to satisfy the listing in any of the four categories. (TR 55-57, 125-136).<sup>5</sup> In addition, claimant presented no evidence to prove his functional limitations were medically equal to those in Listing 12.05(D).

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<sup>5</sup>Claimant's degree of limitation in the four functional limitation areas were as follows:

1. *Moderate* Restriction of Activities of Daily Living
2. *Moderate* Difficulties in Maintaining Social Functioning
3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner occur *Often*
4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptoms have occurred *Once or Twice*



There is also no merit to claimant's contention that the ALJ did not consider his impairments in combination. He discussed claimant's liver and kidney problems (TR 46-48) and hypertension, which was controlled by medication (TR 47) and considered them in combination in properly reaching his conclusion (TR 50). There is no medical evidence of "coordination difficulties" so profound that claimant broke his wrist in a fall, as he contends in his brief at page four.

There is no merit to claimant's contention that the ALJ failed to analyze steps four and five of the sequential evaluation process. Claimant argues that the ALJ erred when he found claimant could return to his past work "at step 3," because the past work was as a part-time dishwasher, which is not substantial gainful activity under 20 C.F.R. § 404.1574(2). However, the record clearly indicates that the ALJ made his decision at step four in finding "claimant's impairments do not prevent the claimant from performing his past relevant work." (TR 54).

The ALJ noted that Dr. Minor Gordon concluded claimant is "obviously capable of performing a routine and repetitive task on a regular basis" and that his mental impairment "does not keep him from working as a dishwasher." (TR 46, 185). Claimant testified that he manages his own money, buys his own food and clothes, regularly drives an automobile, cooks his meals, and cleans his house. (TR 78, 83). Relying upon this testimony and the medical evidence, the ALJ determined at step four that claimant possesses "the residual functional capacity to perform work-related activities except for work involving average or above average intelligence." (TR 54). It was unnecessary to go to step five after this conclusion was reached. 20 C.F.R. § 404.1520(a).

The ALJ found that claimant's current part-time work was not substantial gainful activity because he did not earn more than \$500.00 a month at step one of the sequential evaluation process. (TR 46). However, the ALJ recognized that claimant's work as a dishwasher and car washer during the years of 1965, 1976 through 1979, 1982 through 1984, and 1988 through 1990 met the definitional requirements of substantial gainful activity. (TR 51). Much of claimant's past relevant work has constituted substantial gainful activity, and the ALJ correctly concluded that claimant possesses the residual functional capacity to perform such past substantial gainful activity.

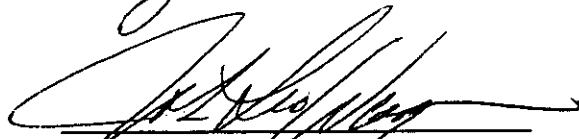
Claimant's contention that the ALJ improperly rejected lay testimony of claimant's family is without merit. Only claimant's sister/guardian testified at the hearing, claiming that he could not handle the stress of a normal work environment, has little stamina, tires easily, sleeps 10-15 hours in a day, and has poor coordination. (TR 90-94). The ALJ discussed her statements and said that he "respected" them, but that they simply were "not supported by any evidence and believable," since claimant never mentioned such complaints to his treating physicians and there was no documentation in the record that he has such problems. (TR 50).

Courts generally treat credibility determinations made by an ALJ as binding upon review. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). To reject testimony - either the claimant's or that of another lay person such as a member of the claimant's family - the ALJ must specifically conclude that the testimony is not credible. Orlando v. Heckler, 776 F.2d 209, 213 (7th Cir. 1985). He must also provide a minimal level of articulation of his reasons for finding lack of credibility. McGee

v. Bowen, 647 F.Supp. 1238, 1246 (N.D. Ill. 1986). The ALJ's decision to give more weight to objective medical testimony than to testimony by claimant's sister is well within his discretion and thus his credibility determination is binding upon this Court.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 25<sup>th</sup> day of January, 1996.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:franklin.or

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 26 1996

*LC*

LARRY A. FRANKLIN,

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of Social Security,<sup>1</sup>

Defendant.

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

Case No: 94-C-919-W ✓

ENTERED ON DOCKET

DATE JAN 29 1996

**JUDGMENT**

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed January 26, 1996.

Dated this 26<sup>th</sup> day of January, 1996.

  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

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<sup>1</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANA M. CARD,

Plaintiff,

v.

SALLY BEAUTY COMPANY, INC.,

Defendant.

No. 95-C-644H ✓

JAN 28 1996

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, her attorney of record, and Defendant's counsel, and would show the Court that this matter has been compromised and settled and, therefore, moves the Court for an Order Of Dismissal With Prejudice.

Ana M. Card

Joy Kay Williams  
Joy K. Williams  
Attorney for Plaintiff

Gregory D. Nellis  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEN ALEXANDER,

Plaintiff,

vs.

THE CITY OF SAPULPA, OKLAHOMA  
an incorporated Municipality,  
SHIRLEY BURZIO, City Clerk,  
individually and in her  
official capacity and other  
UNKNOWN DOES of the City  
Clerks Office, RON SOLE, Chief  
of Police of the City of  
Sapulpa, and other UNKNOWN  
DOES, ROBERT DUPRIEST, the City  
Attorney for the City of  
Sapulpa, individually and in  
his official capacity, Members  
of the City Council of the  
City of Sapulpa, individually  
and in their official capacity,

Defendants.

Case No. 94-C-1191H ✓

ENTERED ON DOCKET

1-29-96

FILED

JAN 26 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

The parties stipulate that all of Plaintiff's claims and causes of action against Defendants Shirley Burzio, Robert DuPriest and Ron Sole are dismissed with prejudice. This dismissal does not apply to the City of Sapulpa, and Plaintiff continues to proceed in this lawsuit against the City of Sapulpa.

By: 

ROBERT ISSAC MAYES, JR. OBA# 14000  
Beacon Building  
406 South Boulder, Suite 708  
Tulsa, Oklahoma 74103

ATTORNEY FOR PLAINTIFF

ELLER AND DETRICH  
A Professional Corporation

By: 

JOHN H. LIEBER, OBA #5421  
2727 East 21st Street  
Suite 200, Midway Building  
Tulsa, Oklahoma 74114  
(918) 747-8900

ATTORNEY FOR DEFENDANTS

3.MAG\ALEXANDE\STIPULAT.DIS

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JAN 26 1996

UNITED STATES OF AMERICA,  
on behalf of Consolidated Farm Service Agency,  
formerly Farmers Home Administration,

Plaintiff,

v.

BRYAN E. KING,

Defendants.

**FILED**

JAN 25 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT

CIVIL ACTION NO. 95-CV-872-K

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 24 day of January, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; and the Defendant, **Bryan E. King, a single person**, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, **Bryan E. King, a single person**, was served by certified mail, return receipt requested, delivery restricted to the addressee on September 6, 1995.

It appears that the Defendant, **Bryan E. King, a single person**, has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that Consolidated Farm Service Agency, formerly Farmers Home Administration, is now known as Farm Service Agency.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of security agreements securing said promissory notes on certain personal property located within the Northern Judicial District of Oklahoma.

NO. 12: THE COURT FINDS THAT THE PLAINTIFFS HAVE PROVEN THEIR CASE AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.



The Court further finds that Bryan E. King, a single person, executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Farm Service Agency, formerly Consolidated Farm Service Agency, the following promissory notes.

Loan Number	Original Amount	Date	Interest Rate
44-05*	\$48,700.00	April 7, 1989	9.50%
44-06	52,100.33	September 4, 1990	9.00%

\* Rescheduled to Loan No. 44-06

The Court further finds that as collateral security for the payment of the above-described notes Bryan E. King, a single person, executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Farm Service Agency, formerly Consolidated Farm Service Agency, the following financing statements and security agreements thereby creating in favor of the Farmers Home Administration, now known as Farm Service Agency, formerly Consolidated Farm Service Agency, a security interest in certain livestock and farm machinery described therein.

Instrument	Dated	Filed	County	File Number
Financing Stmt.	04/07/89	04/07/89	Ottawa	351
Continuation Stmt.	03/15/94	03/15/94	Ottawa	241
OK EFS-1		04/18/89	Secretary of State	895596
OK EFS-3 (cont)		03/03/94	Secretary of State	895596C
Security Agreement	04/07/89			
Security Agreement	07/07/89			
Security Agreement	07/90			
Security Agreement	07/06/90			
Security Agreement	10/06/91			

The Court further finds that the Defendant, **Bryan E. King, a single person**, made default under the terms of the aforesaid notes and security agreements by reason of his failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Bryan E. King, a single person**, is indebted to the Plaintiff in the principal sum of \$52,125.34, plus accrued interest in the amount of \$12,363.01 as of July 5, 1995, plus interest accruing thereafter at the rate of 9.0 percent per annum or \$12.8529 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Farm Service Agency, formerly Consolidated Farm Service Agency, formerly Farmers Home Administration, have and recover judgment against the Defendant, **Bryan E. King, a single person**, in the principal sum of \$52,125.34, plus accrued interest in the amount of \$12,363.01 as of July 5, 1995, plus interest accruing thereafter at the rate of 9.0 percent per annum or \$12.8529 per day until judgment, plus interest thereafter at the current legal rate of 5.16 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject personal property and any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, **Bryan E. King, a single person**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the

Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the personal property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said personal property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the personal property, under and by virtue of this judgment and decree, the Defendant and all persons claiming under him since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject personal property or any part thereof.

**s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

**PETER BERNHARDT, OBA #741**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

ENTERED ON DOCKET  
DATE JAN 28 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT

Civil Case No. 95 C 616K

This matter comes on for consideration this 24 day of January,

The Court further finds that the Defendants, RICHARD JAMES CROLL, JR., and BRENDA SUE CROLL, were served by publishing notice of this action in the Pawnee Chief, a newspaper of general circulation in Pawnee County, Oklahoma, once a week for six

NOTE: THIS ORDER IS TO BE MAILED  
BY MAIL TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

(6) consecutive weeks beginning October 25, 1995, and continuing through November 29, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, RICHARD JAMES CROLL, JR and BRENDA SUE CROLL, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, RICHARD JAMES CROLL and BRENDA SUE CROLL. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, RICHARD JAMES CROLL, JR, BRENDA SUE CROLL, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS,

Pawnee County, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, RICHARD JAMES CROLL, JR, and BRENDA SUE CROLL, are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Pawnee County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot 14, Block 6, CEDAR VIEW ESTATES, a  
Subdivision in Pawnee County, State of Oklahoma,  
according to the Recorded plat thereof.**

The Court further finds that on May 3rd, 1989, the Defendants, RICHARD JAMES CROLL, JR and BRENDA SUE CROLL, executed and delivered to CENTRAL MORTGAGE CORPORATION, their mortgage note in the amount of \$62,072.00, payable in monthly installments, with interest thereon at the rate of Eleven percent (11%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, RICHARD JAMES CROLL, JR and BRENDA SUE CROLL, husband and wife, executed and delivered to CENTRAL MORTGAGE CORPORATION, a mortgage dated May 3rd, 1989, covering the above-described property. Said mortgage was recorded on May 11, 1989, in Book 415, Page 320, in the records of Pawnee County, Oklahoma.

The Court further finds that on May 3, 1989, CENTRAL MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to TRUST AMERICA MORTGAGE, INC. This Assignment of Mortgage was recorded on May 11, 1989, in Book 415, Page 325, in the records of Pawnee County, Oklahoma. This Assignment

of Mortgage was re-recorded on May 19, 1989, in Book 415, Page 624, in the records of Pawnee County, Oklahoma, to correct acknowledgment.

The Court further finds that on May 10, 1989, TRUST AMERICA MORTGAGE, INC., assigned the above-described mortgage note and mortgage to THE FLORIDA GROUP, INC. This Assignment of Mortgage was recorded on July 12, 1989, in Book 417, Page 382, in the records of Pawnee County, Oklahoma.

The Court further finds that on May 22, 1989, THE FLORIDA GROUP, INC., assigned the above-described mortgage note and mortgage to SCG MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on August 24, 1989, in Book 418, Page 404, in the records of Pawnee County, Oklahoma.

The Court further finds that on October 30, 1990, SCG MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT of Washington D.C., his successor and assigns. This Assignment of Mortgage was recorded on November 8, 1990, in Book 429, Page 33, in the records of Pawnee County, Oklahoma.

The Court further finds that on October 1, 1990, the Defendants, RICHARD JAMES CROLL, JR and BRENDA SUE CROLL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on October 1, 1991 and May 1, 1992.

The Court further finds that the Defendants, RICHARD JAMES CROLL, JR and BRENDA SUE CROLL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of

their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, RICHARD JAMES CROLL, JR and BRENDA SUE CROLL, are indebted to the Plaintiff in the principal sum of \$98,165.15, plus interest at the rate of 11 percent per annum from March 16, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, JAMES RICHARD CROLL, JR., BRENDA SUE CROLL, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Pawnee County, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, RICHARD JAMES CROLL, JR and BRENDA SUE CROLL, in the principal sum of \$98,165.15, plus interest at the rate of 11 percent per annum from March 16, 1995 until judgment, plus interest thereafter at the current legal rate of 5.16 percent per annum until paid, plus the costs of this action plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, RICHARD JAMES CROLL, JR., BRENDA SUE CROLL, COUNTY



TREASURER and BOARD OF COUNTY COMMISSIONERS, Pawnee County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, RICHARD JAMES CROLL, JR and BRENDA SUE CROLL, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and

decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

**s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

Judgment of Foreclosure  
Civil Action No. 95 C 616K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

NYALS T. STICE aka NYALS  
TIMOTHY STICE; JACKIE S. STICE  
aka JACKIE SUE STICE; STATE OF  
OKLAHOMA ex rel OKLAHOMA TAX  
COMMISSION; COUNTY TREASURER,  
Tulsa County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma,  
Defendants.

ENTERED ON DOCKET  
DATE JAN 25 1996

**FILED**

JAN 25 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT

Civil Case No. 95-C 570K

**ORDER**

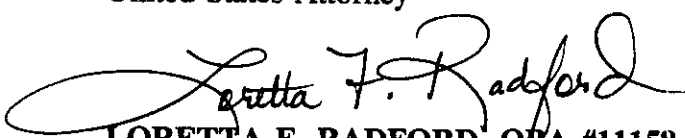
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 24 day of January, 1996.

s/ TERRY C. KEHN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:  
STEPHEN C. LEWIS  
United States Attorney

  
LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

NOTE: THIS ORDER IS TO BE FILED BY MOVANT TO THE COURT'S CLERK AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 24 1996

ARLAND B. MILLWOOD,

Petitioner,

vs.

RONALD J. CHAMPION, et al.,

Respondents.

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

No. 96-CV-25-BU ✓

ENTERED ON DOCKET

DATE 1-25-96

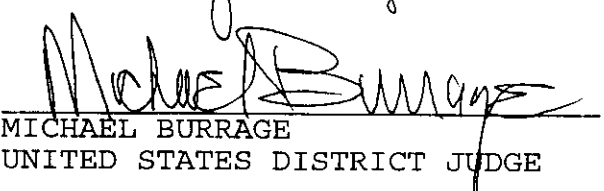
ORDER OF TRANSFER

Before the Court are Petitioner's motion for leave to proceed in forma pauperis and an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Canadian County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district.

Accordingly, Petitioner's application for a writ of habeas corpus and motion for leave to proceed in forma pauperis are **transferred** to the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d). The Clerk shall mail a copy of the petition to Petitioner and the Office of the Oklahoma Attorney General.

IT IS SO ORDERED this 23<sup>rd</sup> day of January, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**JAN 24 1996**

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

OUTBACK STEAKHOUSE OF FLORIDA, INC. )

Plaintiff, )

v. )

OUTBACK SPORTS CAFE, INC. )

Defendant. )

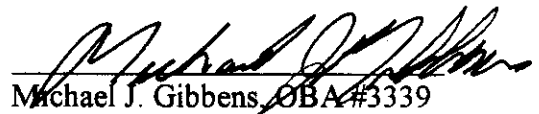
Case No. 95-C-482-H

**ENTERED ON DOCKET**

**DATE 1-25-96**

**STIPULATION FOR DISMISSAL  
WITHOUT PREJUDICE**

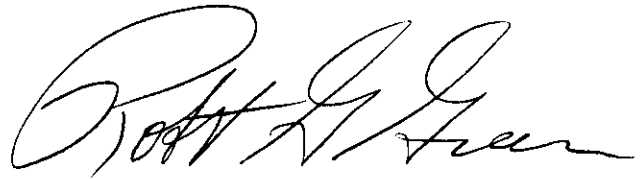
COME NOW Plaintiff Outback Steakhouse of Florida, Inc. and Defendant Outback Sports Cafe, Inc. and stipulate that this case is hereby dismissed without prejudice.

  
Michael J. Gibbens, OBA #3339

- Of the Firm -

**CROWE & DUNLEVY**  
500 Kennedy Building  
321 South Boston  
Tulsa, Ok 74103-3313  
(918) 592-9800

**ATTORNEYS FOR PLAINTIFF  
OUTBACK STEAKHOUSE OF  
FLORIDA, INC.**

A handwritten signature in black ink, appearing to read "Robert G. Green". The signature is fluid and cursive, with the first name "Robert" being more prominent and the last name "Green" following in a similar style.

---

Robert G. Green, OBA #3573  
2420 South Owasso Place  
Tulsa, Oklahoma 74114-2642  
(918) 743-0515

ATTORNEY FOR DEFENDANT  
OUTBACK SPORTS CAFE, INC.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE 1-25-96

NANCY ELLEN SALSMAN, )

Plaintiff, )

vs. )

No. 93-C-1063-H

S&S TRANSPORTATION, )

INC. and RICHARD A. )

SAVOIE, )

Defendants. )

**FILED**

JAN 23 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Application filed herein, the parties have stipulated that all questions and issues existing between the said parties have been fully and completely disposed of by settlement and have requested the entrance of an order of dismissal with prejudice.

IT IS SO ORDERED that the case should be and the same is hereby dismissed with prejudice and the matter fully, finally and completely disposed of.

S/ SVEN ERIK HOLMES

\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

**Attorney for Plaintiffs**



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALLEN RAY LIVINGSTON,

Petitioner,

vs.

DAN REYNOLDS,

Respondent.

No. 94-C-910-K

ENTERED ON DOCKET

DATE JAN 25 1996

**FILED**

JAN 25 1996

ORDER

Richard M. Lawrence, Clerk

U.S. DISTRICT COURT

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his conviction in Tulsa County District Court, Case No. CRF-72-888. Respondent has filed a Rule 5 response. As more fully set out below the Court concludes that this petition should be denied.

**I. BACKGROUND**

In October 1972, Petitioner was convicted by a jury of Robbery with Firearms and sentenced to twenty to one hundred years in prison. After being granted an appeal out of time, Petitioner appealed his conviction and the Court of Criminal Appeals affirmed by unpublished opinion. Subsequently, Petitioner filed an application for post-conviction relief, alleging his sentence was excessive. Petitioner did not appeal the district court's order denying relief. In April 1993, Petitioner filed a second application for post-conviction relief, alleging ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and excessive punishment. The District Court denied

relief and the Court of Criminal Appeals affirmed on the basis of a state procedural bar.

In the present petition for a writ of habeas corpus, Petitioner reasserts the issues raised on direct appeal and in his last application for post-conviction relief.

## II. ANALYSIS

As a preliminary matter, the Court finds Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

### A. Appellate Delay

The Tenth Circuit Court of Appeals has made clear that if a Petitioner's conviction has been affirmed, as in this case, federal habeas corpus relief on the basis of inordinate delay alone is not an available remedy unless Petitioner shows "actual prejudice to the appeal, itself, arising from the delay." Harris v. Champion, 15 F.3d 1538, 1566 (10th Cir. 1994) (Harris II). The Circuit, quoting from Diaz v. Henderson, 905 F.2d 652, 653 (2nd Cir. 1990), reasoned:

An untainted affirmance of a petitioner's state appeal while his habeas petition is pending makes clear that the petitioner was confined pursuant to a valid judgment of conviction throughout the period of delay. The

affirmance established that if the delay had not occurred and petitioner's due process right to a timely appeal had been fully satisfied, he would have been subject to exactly the same term of confinement. Because the due process violation did not result in an illegal confinement, it cannot justify granting the habeas remedy of unconditional release.

Harris II, 15 F.3d at 1566.

After carefully reviewing Petitioner's brief submitted along with his petition for a writ of habeas corpus, the Court concludes Petitioner has not established that, but for the appellate delay, his appeal would have been decided differently. See id. at 1566 (citing Muwakkil v. Hoke, 968 F.2d 284, 285 (2nd Cir.), cert. denied, 113 S.Ct. 664 (1992)). Accordingly, Petitioner is not entitled to relief on the basis of appellate delay.

#### **B. Admonition to Jury**

In ground two of the petition, Petitioner contends the trial court erred in admonishing the jury through out the trial as follows:

I would ask you all not to discuss this case or allow anyone to discuss it with you in your presence, nor should you form or express any opinion as to the guilt or innocence of the defendant, as the case hasn't been submitted to you for your deliberation yet.

(Tr. at 48.) Petitioner alleges that this statement offended his presumption of innocence.

Petitioner's claim is frivolous. Oklahoma Statute title 22, § 854 requires a judge to admonish the jury at each adjournment of the court and inform them that "it is their duty not to converse among themselves or with any one else on any subject connected with

the trial, or to form or express any opinion thereon, until the case is finally submitted to them."

**C. Confession**

In his third ground, Petitioner alleges the trial court erred in admitting a confession obtained from Petitioner after his arrest. The Oklahoma Court of Criminal Appeals declined to review this issue because Petitioner had failed to present any evidence to support his motion to suppress.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). Petitioner has shown neither cause nor prejudice to excuse his default. Accordingly, this ground for relief is procedurally barred.

**D. Evidence of Other Crimes and Statements**

In his fourth ground, Petitioner challenges the admission of evidence showing (a) that the victim had been shot and bound, (b)

that the victim and her husband were concerned about each other's safety, and (c) that the husband had been robbed. As Petitioner failed to object at trial to the introduction of this evidence, the Court of Criminal Appeals reviewed for fundamental error and found the evidence "admissible as evidence which would aid the jury in understanding the entire transaction, and as evidence which would prove elements of the crime charged."

On federal habeas corpus review, this Court is concerned only with whether federal constitutional rights were infringed. "State court rulings on the admissability of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights. Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980). Thus, a federal habeas court "will not disturb a state court's admission of evidence of prior crimes, wrongs or acts unless the probative value of such evidence is so greatly outweighed by the prejudice flowing from its admission that the admission denies defendant due process of law." Hopkins v. Shillinger, 866 F.2d 1185, 1197 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

After considering the above evidence, the Court finds its admission did not render Petitioner's trial fundamentally unfair. Petitioner's reliance on Burk v. State, 594 P.2d 771 (Okla. Crim. App. 1979), for the proposition that the State did not follow proper state procedure to introduce evidence of crimes other than those charged, is misplaced in this case. "In a habeas action, the

inquiry is not whether the state court has properly applied its own rules of evidence, but whether errors of constitutional magnitude have been committed. The State court is the final arbiter of state rules, and [this Court] must uphold its ruling unless the state evidentiary rule itself denies defendants due process." Hopkinson, 866 F.2d at 1197 n.7.

Accordingly, the Court concludes that Petitioner is not entitled to habeas corpus relief on this ground as well.

#### **E. Juvenile Convictions**

Next Petitioner contends the prosecutor committed error when he questioned Petitioner concerning prior convictions. The testimony in question is as follows:

Q. So you were wrong about having no other convictions, weren't you?

A. That was under juvenile.

Q. I'm asking you, sir, if you were convicted.

A. Yes.

Q. So you admit that you were. Did you receive time for that, Mr. Livingston?

A. Yes.

Q. How much time did you receive for that?

A. Two years.

Q. Have you ever been convicted of anything else, Mr. Livingston?

A. Maybe when I was a juvenile and not going to school.

Q. Well, just tell us all about it.

MR. HARRIS: If it please the court --

THE COURT: Sustained.

(Trial tr. at 134.)

The Court of Criminal Appeals held as follows:

A review of the record indicates that the trial judge sustained an objection made by defense counsel when it was clear that the prosecutor was attempting to go into the appellant's juvenile record. Prior to the sustaining of that objection, the questions and answers are ambiguous on whether or not reference is being made to prior convictions or juvenile adjudications. Defense counsel did not follow proper procedure in order to prevent the jury from hearing this testimony as his objection was not timely. Finding no fundamental error this assignment of error is without merit.

Given the overwhelming evidence of guilt at trial, the Court finds the admission of prior conviction did not render Petitioner's trial fundamentally unfair.

**F. Bailiff**

In his fifth ground, Petitioner contends he is entitled to a new trial because the Bailiff entered the outer jury room and requested the jury to come out. The incident at issue occurred after the judge directed the jurors to return to the jury room and reduce a question to writing. At trial, the parties stipulated that the inner door to the jury room was about ten to twelve feet from the outer door. The Bailiff testified that the jurors were not deliberating when she opened the door and asked them to come out.

In a prosecution of a criminal defendant, "any private communication during a trial, directly or indirectly, with a juror about the matter pending before the jury is deemed presumptively prejudicial and the burden is upon the government to show that the contact was harmless." Remmer v. United States, 347 U.S. 227, 229 (1954). It is unclear, however, whether Remmer establishes the

rule that any extrajudicial communication with a juror is presumed to deprive a criminal defendant of due process under the Fourteenth Amendment. Parrott v. Arkansas, 497 F.2d 1123 (8th Cir. 1974). Assuming without deciding, that such is the case, the Court concludes Petitioner is not entitled to relief.

Petitioner did not suffer any prejudice because of the communication. While the Bailiff must not speak or communicate with jurors unless by order of the Court, the statement on its face did not have a coercive effect. At best, the Bailiff's conduct did not meet a standard of excellence; yet did not cause prejudice to Petitioner which would require reversal.

#### **G. Procedural Default of Remaining Grounds**

The alleged procedural default of the remaining grounds results from Petitioner's failure to appeal the denial of his July 1991 application for post-conviction relief, see Okla. Stat. Ann. tit. 22, § 1087 (West 1986), Farrell v. Lane, 939 F.2d 409 (7th Cir.), cert. denied, 502 U.S. 944 (1991), and his failure to raise his ineffective assistance of counsel claims in that application for post-conviction relief. Brecheen v. Reynolds, 41 F.3d 1343, 1363-64 (10th Cir.), cert. denied, 115 S.Ct. 2564 (1995). The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a



result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman, 501 U.S. 722, 724 (1991).

Petitioner attempts to show cause by alleging that he was proceeding pro se with the assistance of an inmate law clerk. Petitioner, however, has no federal constitutional right to effective assistance of counsel at the post conviction level. See Id. at 755-56 (no constitutional right to counsel in a state post-conviction proceeding); see also Carter v. Montgomery, 769 F.2d 1537, 1543 (11th Cir. 1985); Morrison v. Duckworth, 898 F.2d 1298, 1301 (7th Cir. 1990). Therefore, any failure on the part of the inmate law clerk, who assisted Petitioner with his July 1991 post-conviction petition, does not serve as cause to explain Petitioner's default. See Whiddon v. Dugger, 894 F.2d 1266, 1267 (11th Cir.) (because there is no right to legal counsel in collateral proceedings, poor advice about such proceedings from a state provided attorney or inmate law clerk affords no basis for "cause"), cert. denied, 498 U.S. 834 (1990).

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 505 U.S. 333, 339 (1992). Petitioner, however, does not claim that he is actually innocent of the crime at issue in this habeas action. Therefore, Petitioner's remaining grounds of error are procedurally barred.

### III. CONCLUSION

As Petitioner is not in custody in violation of the Constitution or laws of the United States, the petition for a writ of habeas corpus is hereby DENIED. Petitioner's December 1, 1995 "Motion for Order" is DENIED AS MOOT.

SO ORDERED THIS 24 day of January, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 23 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

EMHISER RESEARCH LIMITED, and )  
EMHISER MANUFACTURING LIMITED, )

Plaintiffs, )

vs. )

Case No. 95-C-773H

ALBERT FOWLER; an individual; )  
and A.B. FOWLER TELEMETRY )  
INC., a foreign corporation, )

Defendants. )

ENTERED ON DOCKET

DATE 1-24-96

JUDGMENT

NOW on this 18th day of January, 1996, the captioned matter came on for hearing on Plaintiffs' Motion for the recognition, by this Court, of an Order entered on the 15th day of June, 1995, by the Honorable Justice E. Loukidelis of the Ontario Court (General Division) of Ontario, Canada.

The Court, after considering the pleadings, the evidence and the arguments and briefs of counsel, and based upon the express agreement of the undersigned parties with respect to the provisions of this judgment, makes the following findings:

1. On the 15th day of June, 1995, the Ontario Court (General Division) of Ontario, Canada, entered its Order in favor of Emhiser Research Limited and Emhiser Manufacturing Limited against Albert Fowler and A.B. Fowler Telemetry Inc. A true and correct and certified copy of this Order was presented to the Court as Exhibit "A" to Plaintiffs' Motion for Recognition of Canadian Order.

2. The parties agree that the Canadian Court, including the Ontario Court (General Division) of Ontario, Canada, provides a

judicial system which provides for timely and proper notice of judicial proceedings, an opportunity to present a defense to an unbiased tribunal and conducts regular proceedings according to a system of civilized jurisprudence; and

3. The parties agree that the Canadian Order in question is a non-appealable Order which is conclusive and enforceable where rendered, that the Ontario Court (General Division) had jurisdiction over the subject matter of the controversy and had jurisdiction over the parties.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Defendants, their servants, agents, representatives and others acting on their behalf be and are hereby restrained from directly or indirectly:

- (a) entering into direct or indirect competition with the Plaintiffs by designing, manufacturing and/or distributing telemetry related products, including transmitters and receivers, using military quality standards;
- (b) disclosing or making use of any of the confidential and proprietary information, technology and property of the Plaintiffs;
- (c) passing off products as those of the Plaintiffs; and
- (d) misappropriating and converting confidential and proprietary information of the Plaintiffs, including technical drawings, manuals and

marketing information, as well as customer information.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the Defendant shall deliver up all proprietary and confidential property and information of the Plaintiffs, including without limitation, technical drawings, manuals, brochures and computer diskettes and/or any and all property derived therefrom, including without limitation, the video transmitters which form the subject matter of this action, which are in the possession and/or control of the Defendants, and to specifically delete from the Defendants' computer all property, technical and confidential information of the Plaintiffs, and to disclose to the Plaintiffs the names of all those persons who have received or are in possession of any of the Plaintiffs' confidential, proprietary and technical data;

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the Defendants, their agents, servants, employees keep a full accounting of all contracts entered into with customers of the Plaintiffs for the sale and supply of telemetry equipment similar to or the same as that manufactured by the Plaintiffs, and of all profits made by the Defendants arising from these contracts.

**DATED** this 22ND day of JANUARY, 1996.

JUDGMENT REQUESTED BY AGREEMENT:



---

William S. Leach  
Attorney for Plaintiff



---

Donald G. Hopkins  
Attorney for Defendants

S/ SVEN ERIK HOLMES

---

SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF Syble E. Addington aka Syble Eunice Addington, DECEASED; , appear not, but make default.

The Court further finds that the Defendants, **THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF Syble E. Addington aka Syble Eunice Addington, DECEASED**, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 20, 1995, and continuing through November 24, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF Syble E. Addington aka Syble Eunice Addington, DECEASED**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND**



**UNKNOWN, OF Syble E. Addington aka Syble Eunice Addington, DECEASED.** The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answers on September 5, 1995; that the Defendant, **State of Oklahoma, ex rel. Oklahoma Tax Commission,** filed its Disclaimer on September 21, 1995; and that the Defendants, **THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF Syble E. Addington aka Syble Eunice Addington, DECEASED,** have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**The West Twenty-five (25), feet of Lot Four (4) and the East Thirty-seven and Five tenths (37.5) feet of Lot Five (5), Block Ten (10), HARVARD HILLS, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.**

The Court further finds that this is a suit brought for the further purpose of judicially determining the heirs of Syble E. Addington aka Syble Eunice Addington.

The Court further finds that Syble E. Addington aka Syble Eunice Addington, Deceased, will hereinafter be referred to as "SYBLE E. ADDINGTON, Deceased."

The Court further finds that on January 25, 1985, Syble E. Addington, now deceased, executed and delivered to FIRSTIER MORTGAGE CO., her mortgage note in the amount of \$32,500.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Syble E. Addington, now deceased, executed and delivered to FIRSTIER MORTGAGE CO., a mortgage dated January 25, 1985, covering the above-described property. Said mortgage was recorded on February 1, 1985, in Book 4842, Page 2254, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirstTier Mortgage Co., (formerly known as Realbanc, Inc.), assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on September 20, 1988, in Book 5129, Page 251, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 11, 1989, LEADER FEDERAL BANK FOR SAVINGS, assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, his successors in office and assigns. This

Assignment of Mortgage was recorded on August 11, 1989, in Book 5200, Page 2004, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1990, Syble E. Addington, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on February 1, 1991, February 1, 1992 and February 1, 1993.

The Court further finds that Syble E. Addington died on September 9, 1993, while seized an possessed of the real property being foreclosed. The Certificate of Death No. 22444 was issued by the Oklahoma State Department of Health certifying Syble E. Addington's death.

The Court further finds that Syble E. Addington, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Syble E. Addington, is indebted to the Plaintiff in the principal sum of \$44,349.14, plus interest at the rate of 12 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Syble E. Addington, and to a judicial determination of the heirs of Syble E. Addington.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$12.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, **State of Oklahoma, ex rel. Oklahoma Tax Commission**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, **THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF Syble E. Addington, DECEASED**, are in default and have no right, title, or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem in the principal sum of \$44,349.14, plus interest at the rate of 12 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.16 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the death of Syble E. Addington be and the same is hereby judicially determined to have occurred on September 9, 1993, in the City of Tulsa, County of Tulsa, State of Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that despite the exercise of due diligence by Plaintiff and its counsel no known heirs of Syble E. Addington, Deceased, have been discovered and it is hereby judicially determined that Syble E. Addington, Deceased, has no known HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, and the Court approves the Certificate of Publication and Mailing filed by Plaintiff regarding said heirs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$12.00 for personal property taxes for the year 1193, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF Syble E. Addington, DECEASED; Board of County Commissioners, Tulsa County, Oklahoma, and State of Oklahoma, ex rel. Oklahoma Tax Commission**, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the  
Plaintiff;

**Third:**

In payment of Defendant, County Treasurer, Tulsa County,  
Oklahoma, in the amount of \$12.00, personal property taxes  
which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further  
Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to  
12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to  
possession based upon any right of redemption) in the mortgagor or any other person subsequent  
to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and  
after the sale of the above-described real property, under and by virtue of this judgment and  
decree, all of the Defendants and all persons claiming under them since the filing of the  
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in  
or to the subject real property or any part thereof.

**s/ MICHAEL BURRAGE**

---

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



DICK A. BLAKELEY, OBA #852

Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4841  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95 C 744BU

LFR:flv

FILE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAN 28 1996

U.S. Lawrence, Court Clerk

DEANNE SMITH,

Plaintiff,

v.

ROY DALE MELTON and CITY OF  
DEWEY, OKLAHOMA, a municipality  
in the State of Oklahoma,

Defendants.

Case No. 94-C-1030-B

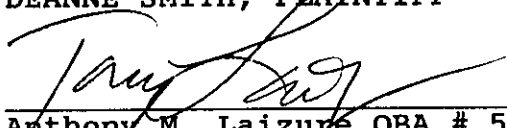
ENTERED ON DOCKET

DATE JAN 24 1996

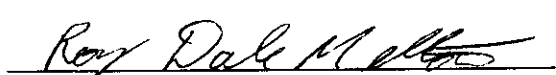
STIPULATION OF DISMISSAL WITH PREJUDICE

The parties stipulate that the above case can be dismissed  
with prejudice against Defendant Roy Dale Melton.

  
DEANNE SMITH, PLAINTIFF

  
Anthony M. Laizure OBA # 5170  
STIPE/LAW FIRM  
P.O. Box 701110  
Tulsa, Oklahoma 74170

ATTORNEY FOR PLAINTIFF,  
DEANNE SMITH

  
ROY DALE MELTON

ELLER AND DETRICH  
A Professional Corporation

By: 

John H. Lieber, OBA # 5421  
2727 East 21st Street  
Suite 200, Midway Building  
Tulsa, Oklahoma 74114  
(918) 747-8900

ATTORNEYS FOR DEFENDANT  
CITY OF DEWEY



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
JAN 25 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

JIMMIE CHARLES CROW, JR.

Plaintiff,

vs.

SHERIFF STANLEY GLANZ and  
UNDERSHERIFF BILL THOMPSON,

Defendants.

Case No. 94-C-1184-B

ENTERED ON DOCKET

DATE JAN 24 1996

O R D E R

Before the Court is Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), or, in the alternative, Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 (Docket #7). Plaintiff Jimmie Charles Crow Jr. ("Crow"), *pro se* and in forma pauperis, alleges that his Eighth Amendment rights were violated at the Tulsa Jail when he was sprayed with pepper gas and subsequently denied medical attention. He further alleges that his Eighth Amendment rights were violated due to: overcrowded and "unracially balanced" conditions; a lack of cleaning supplies; exposure to tuberculosis, influenza and meningitis; lack of medical care for bleeding hemorrhoids; lack of a clean change of clothing; lack of proper exercise; poor food handling; and poor lighting in the cells.

**I. UNDISPUTED FACTS**

1. Crow was incarcerated at the Tulsa Jail, awaiting trial on one count of Unauthorized Use of a Credit Card. He also was being

(10)

held for the U.S. Bureau of Prisons. (Special Report, p. 1)

2. During Crow's incarceration at the Tulsa Jail, he was housed in six different cells. (Special Report, p. 4)

3. Cell D-2-9, which Crow complains was overcrowded, is a twelve-man cell. Defendants admit the cell housed up to 16 prisoners during Crow's incarceration there. (Special Report, p. 5)

4. On December 13, 1994, Crow and other prisoners in his cell were placed in a stairwell during a "shakedown" (a search of the cell for weapons and/or contraband). Inmates in the stairwell began screaming at inmates on the next floor. A sheriff's deputy discharged a single burst of Oleoresin Capsicum spray ("O/C spray") in order to calm the situation. (Special Report, p. 3; Ex. D and F)

5. Crow requested medical attention 48 hours after the incident, but did not mention a reaction to the O/C spray. (Special Report, Ex. E)

6. A hearing was held on January 18, 1995, regarding the use of the O/C spray during the December 13, 1994, incident. Officials determined that use of the spray was appropriate. (Special Report, Ex. F)

## **II. SUMMARY JUDGMENT STANDARD**

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

The plain language of Rule 56<sup>c</sup> mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

\* \* \*

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

*Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

### III. LEGAL ANALYSIS

#### A. O/C Spray

Crow alleges that his Eighth Amendment rights were violated at the Tulsa Jail when he was sprayed with O/C spray and subsequently denied medical attention. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The "unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment." Whitley v. Albers, 475 U.S. 312, 319 (1986). To sustain an Eighth Amendment violation based on deliberate indifference, however, a plaintiff must allege and prove that the conditions evidence a wanton disregard for safety of prisoners and that prison officials had a "sufficiently culpable state of mind." Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994). Prison conditions "must not involve the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Neither can they be disproportionate to the severity of the crime warranting imprisonment. Id.

The undisputed evidence indicates that Crow was not sprayed directly with the O/C spray, but that he was affected by the fumes. (Special Report, Ex. G, p. 2) Nevertheless, the Court concludes that the spraying did not amount to a constitutional violation under the Eighth Amendment's prohibition against cruel and unusual punishment. De minimis application of force, such as the one at issue in this case, is excluded from the Eighth Amendment's cruel and unusual punishment calculation. Hudson v. McMillian, 503 U.S. 1, 9-10, 112 S.Ct. 995, 1000 (1992); see also Sampley v. Ruetters, 704 F.2d 491, 494 (10th Cir. 1983); El'Amin v. Pearce, 750 F.2d 829 (10th Cir. 1984). See also Soto v. Dickey, 744 F.2d 1260 (7th Cir. 1984) ("The use of mace is not per se a violation of the Eighth Amendment"); Blair-El v. Tinsman, 666 F. Supp. 1218 (S.D. Ill. 1987) ("[T]he spraying of plaintiff with C/S gas was reasonably necessary, and part and parcel of a good faith effort to restore prison security. As such, it did not violate plaintiff's Eighth Amendment right to be free from cruel and unusual punishment").

The Court next addresses the issue of whether Crow was denied requested medical attention after the spraying incident. [D]eliberate indifference to the serious medical needs of prisoners [also] constitutes the "unnecessary and wanton infliction of pain" . . . proscribed by the Eighth Amendment." Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citation omitted). This standard has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component

requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991). With regard to the subjective component, "allegations of 'inadvertent failure to provide adequate medical care' or of a 'negligent . . . diagnos[is]'" simply fail to establish the requisite culpable state of mind." Id. at 2323; see also El'Amin v. Pearce, 750 F.2d 829, 832-33 (10th Cir. 1984).

Defendants allege in their Motion for Summary Judgment that Crow did not request medical attention after the O/C spray incident. However, the Special Report indicates that Crow did request medical attention. The Report provides a grievance form from Crow, dated December 21, 1994, which states that "I received a reaction to this [spray] and requested medical attention from Cpl. Harrell and was denied". (Defendant's Ex. G, p. 4) The Report also provides a statement by prisoner David Grubb about the O/C spraying incident. Grubb stated that, to his knowledge, Crow did not request medical attention while they were on the stairway but Crow did request to see the nurse once they were back in the cell. (Defendant's Ex. G, p. 2) Further, Crow provides a copy of an Inmate Health Service Request he filled out, dated December 13, 1994, that states "I have a rash and swollen eyes from a pepper gas spraying. Would like to see the nurse!"<sup>1</sup> Given the conflicting evidence as to whether Crow requested medical attention, the Court hereby denies Defendants' Motion for Summary Judgment as to this

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<sup>1</sup>The Court notes there is no way to tell whether Tulsa Jail officials actually received the Inmate Health Service Request, as the portion to be filled out by officials is blank.

issue.<sup>2</sup>

#### **B. Conditions of Confinement**

The remainder of Plaintiff's complaint centers around general conditions of his confinement. Crow alleges that his Eighth Amendment rights were violated due to a number of confinement conditions at the Tulsa Jail: overcrowded and "unracially balanced" cells; a lack of cleaning supplies; exposure to tuberculosis, influenza and meningitis;<sup>3</sup> lack of medical care for bleeding hemorrhoids;<sup>4</sup> lack of a clean change of clothing; lack of proper exercise; poor food handling; and poor lighting in the cells.

The Court cannot become involved in the minor details of running the county jail. Daily decisions concerning prisoners are best left to those entrusted with their confinement. Only when constitutional abuse is apparent should the Court interfere with the administrative functioning of the jail. It is fundamental that loss of liberty and freedom of choice occur during lawful incarceration. Corrections officials cannot accommodate the precise needs of every inmate. Consequently, some level of

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<sup>2</sup>The Court does not address the issue of whether Crow has named the proper defendants in this case, because Defendants do not raise this issue in their Motion.

<sup>3</sup>There is no evidence in the record that Crow was ever exposed to such diseases; rather, his claim is that he was housed with inmates who had not been tested for these diseases.

<sup>4</sup>There is no evidence in the record that Crow ever requested medical attention for bleeding hemorrhoids.

discomfort is inherent in any incarceration, and as long as that discomfort does not amount to punishment it does not violate a prisoner's constitutional rights.

The majority of Crow's complaints regarding conditions at the Tulsa Jail--except for the alleged denial of a clean uniform and a clean towel--do not amount to punishment. While prison overcrowding may violate the Constitution if it is so egregious that it endangers the safety of inmates, Crow has failed to show that the crowded condition at the Tulsa Jail caused Crow any physical injury.<sup>5</sup> Even if Crow was forced to sleep on a mattress on the floor, the Constitution is indifferent as to whether that mattress is on the floor or on a bed, absent some aggravating circumstances. See Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); Castillo v. Bowles, 687 F. Supp. 277, 281 (N.D. Tex. 1988).

The Court concludes, however, that there remain genuine issues of material fact as to whether Crow was denied a clean uniform and towel for more than a temporary period of time. Although the Special Report indicates that inmates should receive a complete change of clean clothing at least once a week, Crow has controverted Defendants' evidence by presenting copies of prison

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<sup>5</sup>The Crime Control and Law Enforcement Act of 1994 recently amended title 18 of the United States Code by adding at the end section 3626 on prison overcrowding. Subsection (a)(1) of section 3626 requires the following showing with respect to a particular plaintiff claiming prison overcrowding:

(1) HOLDING.--A Federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment of that inmate.



grievances that reveal that Crow did not receive a clean towel for over one month.<sup>6</sup> Further, the Court notes that the Special Report addresses Crow's incarceration from November 15, 1994, until February 9, 1995. Crow, however, provided copies of one grievance he filed on July 5, 1994 (regarding not having received a change of clothes in more than 50 days); and two grievances he filed on August 9, 1994 (one regarding being held with 19 men in a 12-man cell, and one stating that he only received one change of clothes and bed linen since May 16, 1994). The Special Report did not address these grievances nor did it address the discrepancy in dates of incarceration; instead, it only addressed grievances filed after November 15, 1994. Crow did not limit his Complaint solely to the actions taken between November 15, 1994, and February 9, 1995. Because the failure to regularly provide prisoners with clean towels and clothing constitutes a denial of personal hygiene and sanitary living conditions, see, e.g., Dawson v. Kendrick, 527 F. Supp. 1252, 1288-89 (S.D.W.Va. 1981); see also Williams v. Hart, 930 F.2d 36, 1991 WL 47118, at \*2 (10th Cir. 1991) (unpublished opinion), the Court denies Defendants' motion for summary judgment as to this issue.

In summary, Defendants' Motion for Summary Judgment is denied as to the issues of denial of medical care after the O/C spraying incident and as to failure to provide clean uniforms and towels;

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<sup>6</sup>Regulations state that "all inmates shall receive a complete change of clothing each week". (Special Report, Ex. H) While the Special Report provides a copy of the appropriate regulation, Defendants provide no evidence to indicate whether such regulation was followed.

Defendants' Motion for Summary Judgment is granted as to all remaining issues.

The parties shall comply with the following schedule:

March 11, 1996	EXCHANGE OF NAMES AND ADDRESSES OF WITNESSES FOR EACH SIDE
March 25, 1996	DISCOVERY TO BE COMPLETE
April 5, 1996	MOTION FILING DEADLINE
April 19, 1996	RESPONSE BRIEF DEADLINE
April 29, 1996	REPLY BRIEF DEADLINE
June 3, 1996	AGREED PRE-TRIAL ORDER DUE, <sup>7</sup> AND EXCHANGE OF PRE-MARKED EXHIBITS
June 10, 1996	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ANY TRIAL BRIEFS DUE
June 17, 1996	NON-JURY TRIAL @ 9:30 a.m.

IT IS SO ORDERED this 23<sup>rd</sup> day of January, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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<sup>7</sup>Defendants shall be the moving party on creating the Pre-trial Order.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DURENDA ESTRADA,

Plaintiff,

v.

UNITED STATES POSTMASTER  
GENERAL,

Defendant.

)  
)  
)  
)  
) Case No. 95-C-0107-B  
)  
)  
)  
)  
)

ENTERED ON DOCKET


DATE JAN 24 1996

STIPULATION OF DISMISSAL

The plaintiff, Durenda Estrada, by her attorney of record, Katherine T. Waller, and the defendant, United States Postal Service, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and Sandra Walton Bowens, Attorney, United States Postal Service, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 23rd day of January, 1996.

Katherine T. Waller  
KATHERINE T. WALLER, OBA# 15051  
LEBLANG & CLAY  
7666 E. 61st Street, Suite 251  
Tulsa, OK 74133

  
**CATHRYN MCCLANAHAN, OBA# 14853**  
**ASSISTANT UNITED STATES ATTORNEY**  
**333 West 4th Street, Suite 3460**  
**Tulsa, OK 74103-3809**

**SANDRA WALTON BOWENS**  
**Regional Counsel**  
**United States Postal Service**  
**Law Department, Southern Division**  
**225 N. Humphreys Blvd.**  
**Memphis, TN 38166-0170**

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATHAN EUGENE WILLIAMS; ANN  
LOUISE WILLIAMS; STATE OF  
OKLAHOMA ex rel OKLAHOMA TAX  
COMMISSION; COUNTY TREASURER,  
Tulsa County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma,

Defendants.

**FILED**

JAN 23 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE JAN 24 1996

Civil Case No. 95-C 707E

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 22<sup>d</sup> day of Jan,

1996 The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, appears by Assistant General Counsel Kim D. Ashley; and the Defendants, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, NATHAN EUGENE WILLIAMS, acknowledged receipt of Summons and

Complaint via certified mail on September 1, 1995; and that the Defendant, ANN LOUISE WILLIAMS, was served with process on October 20, 1995.

The Court further finds that the Defendants, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS are husband and wife.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on September 5, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Answer on August 23, 1995; and that the Defendants, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seven (7), Block Eleven (11), HOLLIDAY HILLS  
ADDITION to the city of Tulsa, Tulsa County, State of  
Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 26, 1983, Carl Schmidt and Kimberly J. Schmidt, executed and delivered to OKLAHOMA MORTGAGE COMPANY, INC. their mortgage note in the amount of \$59,000.00, payable in monthly installments, with interest thereon at the rate of eleven and three-quarters percent (11.75%) per annum.

The Court further finds that as security for the payment of the above-described note, Carl Schmidt and Kimberly J. Schmidt, Husband and Wife, executed and delivered to OKLAHOMA MORTGAGE COMPANY, INC. a mortgage dated May 26,

1983, covering the above-described property. Said mortgage was recorded on May 27, 1983, in Book 4694, Page 1309, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 16, 1983, OKLAHOMA MORTGAGE COMPANY, INC. assigned the above-described mortgage note and mortgage to The New York Guardian Mortgagee Corp. This Assignment of Mortgage was recorded on July 14, 1983, in Book 4706, Page 1213, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1989, The New York Guardian Mortgagee Corp. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, his/her successors and assigns. This Assignment of Mortgage was recorded on March 3, 1989, in Book 5169, Page 2651, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS, are the current title owners of the property by virtue of a General Warranty Deed dated February 22, 1985, and recorded on March 1, 1985 in Book 4847, Page 1558, in the records of Tulsa County, Oklahoma. The Defendants, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS, are the current assumptors of the subject indebtedness.

The Court further finds that on January 11, 1989, the Defendants, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on December 4, 1989, July 5, 1990, May 1, 1991, January 29, 1992, and February 2, 1993.

The Court further finds that the Defendants, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS, are indebted to the Plaintiff in the principal sum of \$100,905.90, plus interest at the rate of 11.75 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$40.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of a tax warrant in the amount of \$1,127.91, which became a lien on the property as of October 25, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS, are in default, and have no right, title or interest in the subject real property.



The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS, in the principal sum of \$100,905.90, plus interest at the rate of 11.75 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.16 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$40.00, plus costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, have and recover judgment in rem in the amount of \$1,127.91 for state taxes, plus the costs and interest.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, NATHAN EUGENE WILLIAMS, ANN LOUISE WILLIAMS, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, NATHAN EUGENE WILLIAMS and ANN LOUISE WILLIAMS, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

**Third:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$40.00, personal property taxes which are currently due and owing.

**Fourth:**

In payment of Defendant, STATE OF OKLAHOMA ex rel

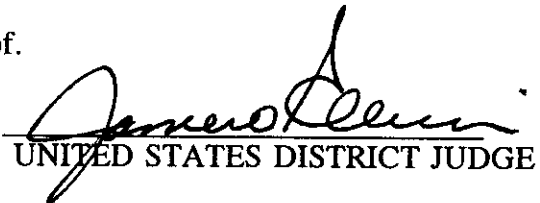
OKLAHOMA TAX COMMISSION, in the amount of \$1,127.91.

state taxes, plus accrued and accruing interest which  
are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await  
further Order of the Court.

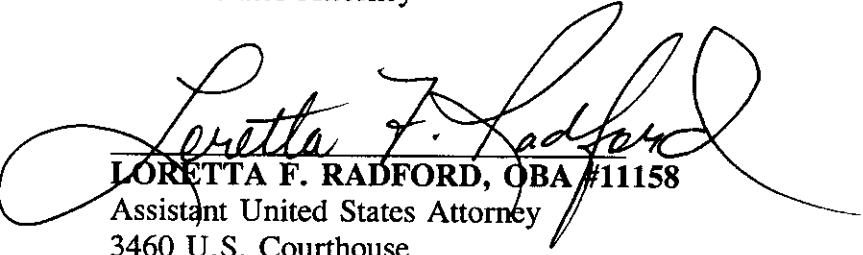
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that  
pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all  
instances any right to possession based upon any right of redemption) in the mortgagor or  
any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from  
and after the sale of the above-described real property, under and by virtue of this judgment  
and decree, all of the Defendants and all persons claiming under them since the filing of the  
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim  
in or to the subject real property or any part thereof.

  
UNITED STATES DISTRICT JUDGE


APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
\_\_\_\_\_  
**DICK A. BLAKELEY, OBA #852**

Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

  
\_\_\_\_\_  
**KIM D. ASHLEY, OBA #14175**

Assistant General Counsel  
P.O. Box 53248  
Oklahoma City, OK 73152-3248  
(405) 521-3141  
Attorney for Defendant,  
State of Oklahoma ex rel  
Oklahoma Tax Commission

Judgment of Foreclosure  
Civil Action No. 95-C 707E

LFR/lg

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

BILLY B. BERRY;  
MARY CATHRINE BERRY;  
FEDERAL NATIONAL MORTGAGE  
ASSOCIATION;  
RESOLUTION TRUST CORPORATION, as  
Conservator for Standard Federal Savings Association,  
Transferee of Resolution Trust Corporation,  
as Receiver for Standard Federal Savings Bank;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET  
DATE JAN 24 1996

FILED  
JAN 23 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 95-C-636-C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23<sup>rd</sup> day of Jan, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Billy B. Berry; Mary Cathrine Berry; Federal National Mortgage Association; and Resolution Trust Corporation, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Billy B. Berry**, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on September 22, 1995; that the Defendant, **Mary Cathrine Berry**, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on September 22, 1995; that the Defendant, **Federal National Mortgage Association**, executed a Waiver of Service of Summons on July 14, 1995 which was filed on July 17, 1995; that the Defendant, **Resolution Trust Corporation**, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on July 17, 1995 and September 26, 1995.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on July 20, 1995; that the Defendants, **Billy B. Berry; Mary Cathrine Berry; Federal National Mortgage Association; and Resolution Trust Corporation**, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lots Two (2) and Three (3), Block Seven (7), NORTHGATE  
THIRD ADDITION, an Addition in Tulsa County, State of  
Oklahoma, according to the recorded plat thereof.**

The Court further finds that on November 6, 1986, the Defendants, Billy B. Berry and Mary Cathrine Berry, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$25,500.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Billy B. Berry and Mary Cathrine Berry, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated November 6, 1986, covering the above-described property. This mortgage was recorded on November 7, 1986, in Book 4981, Page 645, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, **Billy B. Berry and Mary Cathrine Berry**, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Billy B. Berry and Mary Cathrine Berry**, are indebted to the Plaintiff in the principal sum of \$23,800.85, plus administrative charges in the amount of \$565.00, plus penalty charges in the amount of \$53.17, plus accrued interest in the amount of \$396.71 as of March 27, 1995, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$457.43, plus penalties and interest, for the year 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, **Federal National Mortgage Association and Resolution Trust Corporation**, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank, are in default and therefore have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment against the Defendants, **Billy B. Berry and Mary Cathrine Berry**, in the principal sum of \$23,800.85, plus administrative charges in the amount of \$565.00, plus penalty charges in the amount of \$53.17, plus accrued interest in the amount of \$396.71 as of March 27, 1995, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.16 percent per annum until paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the



amount of \$457.43, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **Federal National Mortgage Association; Resolution Trust Corporation**, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank; and **Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, **Billy B. Berry and Mary Cathrine Berry**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

**Third:**


In payment of the judgment rendered herein in favor of the Plaintiff.


**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
**PHIL PINNELL, OBA #7169**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
**DICK A. BLAKELEY, OBA #852**  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4841  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Case No. 95-C-636-C (Berry)

PP:css

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELISSA M. CARTER,

Plaintiff,

vs.

STEVE SPEEGLE, individually,  
OKLAHOMA SAFETY COUNCIL,  
an Oklahoma not-for-profit corporation,

Defendant.

Case No. 95-C-472B

ENTERED ON DOCKET  
JAN 23 1996  
DATE \_\_\_\_\_

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Comes now before the court Plaintiff Melissa M. Carter and Defendants Steve Speegle and Oklahoma Safety Council, Inc., stipulate, in accordance with Fed. R. Civ. P. 41(a)(1) that the above referenced-action, and all claims, causes of action, and demands made in connection therewith, be dismissed with prejudice.

Respectfully submitted this 22<sup>nd</sup> day of January, 1996.

APPROVED BY:

HANSON, HOLMES, SNIDER & SHIPLEY



Charles O. Hanson  
Richard Holmes  
5918 East 31st Street  
Tulsa, Oklahoma 74135  
(918) 627-4400

ATTORNEYS FOR PLAINTIFF  
MELISSA M. CARTER

APPROVED BY:

BOONE, SMITH, DAVIS, HURST,  
& DICKMAN

A handwritten signature in cursive script, appearing to read "Nancy Lynn Davis", written over a horizontal line.

Frederic N. Schneider, OBA #8010

Nancy Lynn Davis, OBA #15214

500 ONEOK Plaza

100 West Fifth

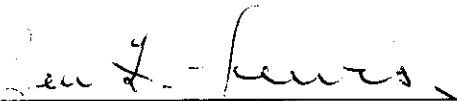
Tulsa, Oklahoma 74103

(918) 587-0000

ATTORNEYS FOR DEFENDANTS  
STEVE SPEEGLE and OKLAHOMA  
SAFETY COUNCIL

APPROVED BY:

BEN LEWIS & ASSOCIATES

A handwritten signature in dark ink, appearing to read "Ben F. Lewis", is written over a horizontal line.

Ben F. Lewis, Esq.  
2401 Liberty Tower  
Oklahoma City, Oklahoma 73102  
(405) 232-1251

ATTORNEY FOR DEFENDANT  
STEVE SPEEGLE

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAN 22 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

SHIRLEY ROPER,  
  
Plaintiff,  
  
vs.  
  
CARE CONCEPTS, INC.,  
  
Defendant.

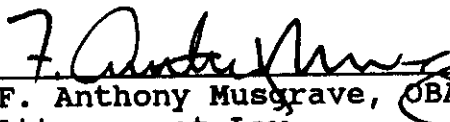
Case No. 95-C-201-B

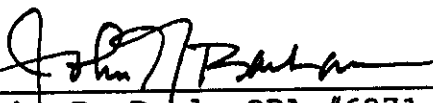
ENTERED ON DOCKET  
DATE JAN 23 1996

STIPULATION OF DISMISSAL

COMES NOW, all parties of record in the above action, by and through their respective attorneys of record, and in accordance with Rule 41 of the Federal Rules of Civil Procedure, hereby stipulate to dismissal of the above action with prejudice to refileing of same.

Respectfully submitted,

  
F. Anthony Musgrave, OBA #10107  
Attorney at Law  
5319 S. Lewis, Ste 110  
Tulsa, Oklahoma 74105  
(918) 748-8118

  
John R. Paul, OBA #6971  
John G. Barnhart, OBA #15721  
RICHARDS, PAUL & RICHARDS  
9 East 4th Street, Suite 400  
Tulsa, Oklahoma 74103-5118  
(918) 584-2583

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 22 1996

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

SHIRLEY TREVATHAN NOWLIN,  
Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of Social Security,<sup>2</sup>  
Defendant.

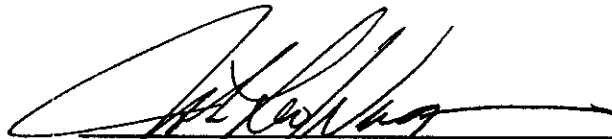
Case No: 93-C-369-W

ENTERED ON DOCKET  
DATE JAN 23 1996  
JAN 23 1996

**JUDGMENT**

Judgment is entered in favor of the Plaintiff, Shirley Trevathan Nowlin, in accordance with this court's Order filed January 22, 1996.

Dated this <sup>10</sup>20 day of January, 1996.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

<sup>2</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 23 1996

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

SHIRLEY TREVATHAN NOWLIN,

Plaintiff,

v.

SHIRLEY S. CHATER,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

Case No. 93-C-369-W

ENTERED ON DOCKET

DATE JAN 23 1996

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of United States Administrative Law Judge James D. Jordan (the "ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within

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<sup>1</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.



the meaning of the Social Security Act.<sup>2</sup>

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.<sup>3</sup> He found that claimant had postural imbalance, secondary to pes planovalgus, pelvic obliquity, and lumbopelvic lordosis, thoracolumbar scoliosis, and multiple regions of somatic dysfunction. He concluded that she had the residual functional capacity to perform work related activities, except for work involving the inability to lift more than 20 pounds at a time and lift/carry more than 10 pounds frequently, to stand/walk over 6 hours, to sit over 6 hours in an 8-hour day, and to stoop more than occasionally. He found that her past relevant work as a counter attendant in a dry cleaning facility, as that work is normally performed in the national economy, did not require the performance of work-related activities precluded by the above limitations, so her impairments did not prevent her from performing her past relevant work. Having

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<sup>2</sup> Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

<sup>3</sup> The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
  2. If claimant is not working, does the claimant have a severe impairment?
  3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
  4. Does the impairment prevent the claimant from doing past relevant work?
  5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?
- 20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ ignored the treating physician rule.
- (2) The ALJ did not properly apply the pain standard set out in Luna v. Bowen, 834 F.2d 161, 164 (10th Cir. 1987).
- (3) The ALJ improperly assessed claimant's nonexertional mental impairment.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant claims she has not worked since November 15, 1989, because of curvature of her spine, scoliosis, and resulting pain in her joints (TR 91). Dr. Thomas Schooley began treating her on February 9, 1990 for arthritic pain, chronic back problems, her short leg, hypertension, and depression and continued treating her through August 6, 1991. (TR 159-170, 183-185).

Claimant was seen by Dr. James McKay for a rheumatologic consultation on August 22, 1990 (TR 135 - 148). X-rays taken two days earlier had shown "sacral base unleveling with declination to the left measuring 3.3 cm," a left leg measuring 2 cm shorter than the right leg, and "mild thoracic scoliosis with a concavity to the patient's right measuring 12 degrees." (TR 146). The doctor concluded she had osteoarthritis, fibromyalgia, and short leg syndrome (TR 135). He noted that she had "diffuse myalgias and arthralgias," but no

evidence of synovitis, effusion, warmth, erythema, or "inflammatory arthropathy," although her history suggested such symptoms (TR 135-137). He stated that he wanted to review lab tests and previous records to gain an understanding of her complaints (TR 137).

On September 4, 1990, Dr. McKay reported that laboratory tests showed "an abnormal postural study" and a joint exam revealed no synovitis, warmth or erythema, but evidence of Heberden's and Bouchard's nodes consistent with osteoarthritis (TR 133-134). On September 10, 1990, there was no synovitis, effusion, or erythema, a sedimentation rate of 25, and negative rheumatoid factor and ANA (TR 131-132). The doctor concluded that claimant was a diabetic, but found no inflammatory myopathy and concluded her low back pain was due to scoliosis and her short left leg (TR 131-132).

A final letter from Dr. McKay on October 5, 1990, reported that claimant had been referred to Dr. Kenneth Graham for lift therapy, and had not had an erythematous, warm, or swollen knee joint (TR 129). Her depression concerning her pain and marital problems was not evident (TR 129). The doctor concluded that she had diabetes mellitus, but no evidence of inflammatory arthritis (TR 129-130). He determined that he did not need to see her again, as her discomfort was due to "mechanical etiologies" being addressed by Dr. Graham (TR 130).

Dr. Graham, an osteopath specializing in medical education, saw claimant from September 25, 1990 to March 5, 1991 for back pain radiating down her left leg (TR 150-158). On September 25, 1990, he noted that he wanted to add 1/8" to her left heel (TR 155). On November 6, 1990, he prescribed that the shoe be rebuilt to 3/8" (TR 154). Her complaints of pain varied from one weekly visit to the next (TR 150-154). Dr. Graham

also saw her from April 9, 1991 to July 2, 1991, and her complaints of back, neck, and rib cage pain varied from visit to visit (TR 180-182). The doctor prescribed Prozac for her depression (TR 180-181). Her leg, hip, and back pain and mood continued to be up and down in the doctor's reports through September 8, 1991 (TR 211-214).

On June 27, 1991, Dr. Robert Irvin examined claimant for recurrent pain in her feet, ankles, calves, thighs, knees, hips, and back (TR 171-172). He found multiple arthrodial restrictions and bilateral pes planovalgus (TR 171). He took x-rays and concluded that she had postural imbalance secondary to pes planovalgus, pelvic obliquity and lumbopelvic lordosis, thoracolumbar scoliosis, secondary to postural imbalance, and multiple regions of somatic dysfunction (TR 172). Dr. Irvin recommended heel and ischial lift therapy and bilateral molded orthotics with related therapy. Dr. Irvin's treatment notes from June 24 to July 9, 1991 show that she had thoraco-lumbar and cervical somatic dysfunction and received lift therapy (TR 188-189). She was seen by Dr. JoAnn Ryan on July 12 and 19, 1991, while Dr. Irvin was out of town, and the doctor reported that she was in severe pain on the 12th, but not as severe on the 19th (TR 215-216).

On January 14, 1992, Dr. Graham reported that claimant had told her she had suffered back pain for the last seventeen years after falling off a porch (TR 220). He noted that she had arthritis, which was managed with Disalsid, and diabetes, managed with diet (TR 220). The doctor noted that she had "multiple areas of pain and tenderness throughout her body" and "pain to palpation of the low back, left hip, [and] thoracic and cervical spine." (TR 220). The doctor found that "severe paravertebral muscle spasms were noted throughout the cervical, thoracic, and lumbar spine. There was slight muscle

weakness noted to the dorsiflexion of the left foot, but the lower extremities were otherwise neurologically intact. The claimant remained moderately depressed because of her pain and family problems." (TR 220). X-rays of the pelvis, thoracic, and lumbar spine revealed "moderate degenerative changes of the lumbar spine, moderately severe lumbar curvature (15 degrees), moderate thoracic curvature and a sacral base unlevelness of 1 and 3/16ths inch." (TR 220).

Dr. Graham indicated on January 14, 1992 that claimant reported moderate relief of pain following heel lift therapy for the sacral base unlevelness and conservative pain management, including rest, medication, and osteopathic manipulative treatments (TR 220). The doctor's diagnosis included postural imbalance, secondary to 1-3/16 sacral base unlevelness, degenerative joint disease in the lumbar spine, rheumatoid arthritis in the pelvis, thoracic, and lumbar spine, diabetes mellitus, paravertebral muscle spasms in the thoracic and lumbar spine, possible L-5 nerve root impingement, secondary to degenerative joint disease, and depression (TR 220-221). He stated that fibromyalgia could not be ruled out (TR 221).

On January 28, 1992, Dr. Harold Goldman, a medical expert who did not examine claimant, but reviewed her medical records, stated in a letter that claimant's ability to perform work was limited "not by anatomical considerations but strictly by pain limitations" (TR 222). He noted that there were no limitations imposed on her by her doctors (TR 222). He determined that she should be able to lift 25 to 35 pounds frequently, bend, squat, and kneel frequently, and have no difficulty from exposure to environmental factors, climbing, or being around dangerous machinery (TR 222). He noted that she had had no

evidence of inflammatory arthritis or joint deformity (TR 223). He concluded that the diagnosis of fibromyalgia by other doctors required 14 or 18 tender points, which she did not have, so he believed it was not a proper diagnosis.

The ALJ concluded that the opinion of the medical expert was persuasive, as it was supported by the other medical evidence (TR 24). He concluded that claimant's chemical profile of diabetes did not limit her ability to work, and that there was no clinical evidence for inflammatory arthritis (TR 24). He stated that most of her discomfort was due to mechanical etiology, which he felt "was addressed by Dr. Graham." (TR 24). He also concluded that her hypertension was controlled by medication and did not limit her ability to work (TR 25). He determined that her pain limited her ability to do more than light work (TR 25). He recognized that she had taken medications for depression and anxiety, but had not been treated by a psychiatric specialist or undergone mental health counseling (TR 25).

The ALJ noted that claimant had reported on April 29, 1991 that she washes a few dishes, makes her bed, and does some laundry and a little housecleaning during the day (TR 100). She goes shopping with her husband weekly to buy food and shopping with her daughter once every two weeks (TR 100). She enjoys watching comedy and westerns on television and likes to read (TR 100). She used to enjoy crocheting, but she stated it was difficult for her to do it (TR 100). She visits her sister once every 3 to 4 months and her daughter stops by almost daily (TR 100).

At a hearing on November 7, 1991, claimant testified that she last worked in the fall of 1989, quitting because her pain was so bad she couldn't stand being on her feet any

longer (TR 49). She testified that she has a driver's license, but had last driven 4 months prior to the hearing (TR 49). She does not like to go anywhere because of her pain, but goes to the doctor's office, grocery store, and Wal-Mart (TR 50).

Claimant testified that she has so much pain she spends most of her time in bed (TR 51). When she gets up, she has to lean against the wall when going into the kitchen (TR 51). She testified that she does not watch television, because noise gets on her nerves (TR 60). She likes to read, but sometimes the pain is so bad that she doesn't try to do anything (TR 60). She takes hot baths 20 to 30 minutes for pain (TR 51).

Claimant testified that her daughter helps her with her household chores, but claimant cooks a meal once a week if she can (TR 62). She used to love to sew and crochet, but it has been over a year and a half since she has done these things (TR 51). She used to love to work outside with flowers, but cannot do so now (TR 63). She has been advised by her doctor to do light stretching, but when the pain is too severe, she is unable to do this (TR 53).

Claimant testified that she takes Lodine and Darvocet, but the Darvocet makes her drowsy (TR 60). The claimant's medication does not relieve her pain, but it relaxes her so that she can sleep (TR 60). The claimant had taken Vicodin, but it made her want to cry all the time, and her doctor advised her not to take it anymore (TR 61). She takes Pamelor to help her cope with her pain and rest (TR 61). She started using a walker 3 weeks ago when she could no longer walk without one (TR 53). She can walk to the bathroom, stand 10 to 15 minutes, sit 10 to 15 minutes, and lift a gallon of milk (TR 54-55). Since November 1989, her condition has remained approximately the same (TR 54).

The ALJ recognized that claimant alleged side effects, such as drowsiness and feeling sad, from her medications, but concluded that a review of the medical documents did not suggest any consistent complaints that showed side effects of a degree that would impede her ability to perform work-like activity (TR 28). For this reason, the ALJ considered any side effects to which the claimant might be subject not of a sufficiently significant degree to interfere with her ability to perform work-like activity (TR 28).

The ALJ noted that claimant said her condition had not changed significantly since her alleged outset date of November 1989 and that her testimony that she could not watch television or read conflicted with her written statement that she did these activities (TR 28, 60, 100). He pointed out that, while she stopped working in November of 1989, she did not seek treatment until February 1990, at the very earliest, and only sought treatment from other physicians almost a year later (TR 28, 29). The ALJ questioned why, had the claimant's condition been so serious as to compel her to leave work, she had not sought medical treatment earlier than she did (TR 29). Finally, the ALJ noted that his questioning of the degree and intensity of claimant's alleged symptoms was supported by the opinion of the medical expert (TR 29). He found that her pain did not preclude her from doing light work (TR 29).

There is merit to claimant's first two contentions. The record shows that two of claimant's treating physicians, Dr. McKay and Dr. Graham, concluded that she suffers from fibromyalgia (TR 135, 221). This diagnosis is made by ruling out other possible causes of pain (TR 190-206). The court in Cline v. Sullivan, 939 F.2d 560, 566-67 (8th Cir. 1991) discussed the ailment, defining it as "a degenerative disease which results in symptoms,



such as achiness, stiffness, and chronic joint pain, which . . . does not usually lead to total incapacitation, [but] it can . . . ." Id. at 567. The court noted that objective medical evidence is not needed to support subjective testimonial evidence of pain, and that an ALJ may not base a denial of benefits solely on a lack of objective medical evidence. Id. at 566.

The complaints in Cline were similar to claimant's complaints. The court in Cline examined numerous medical reports from physicians consulted by the claimant in the course of attempting to obtain pain relief, and noted that five doctors had diagnosed inflammation of the joints. Id. at 566-567. A sixth doctor diagnosed the ailment as fibromyalgia, and, as this was the first conclusive diagnosis, the court found the doctor's evidence most credible. Id. at 567. Since that doctor found that the pain and discomfort of the disease can limit a patient's work capacity, the court concluded:

Finding, as we must, that the remaining factors relied upon by the ALJ are insubstantial, the net result of our inquiry is that the inconclusive medical evidence stands alone as a potential justification for the denial of appellant's application for benefits. It being impermissible to deny benefits for a nonexertional impairment such as pain on this basis alone, and finding appellant credible in all other respects, we can not say that fairness is obtained by denying appellant's claim merely because the objective medical evidence in favor of her claim could have been stronger.

Id.

In this case, the ALJ spent much time summarizing medical evidence and then agreed with the finding of the medical expert, who had never examined the claimant and was a neurologist, not a rheumatologist.

The Tenth Circuit Court of Appeals held in Harris v. Secretary of Health & Human Servs., 821 F.2d 541, 544 (10th Cir. 1987), that it was "by now well established in this Circuit [that] the conclusory opinions of reviewing doctors cannot outweigh credible

evidence provided by the claimant's treating physician." If an ALJ rejects such an opinion, he must state specific, legitimate reasons for doing so. Talbot, 814 F.2d at 1464.

In the case at bar, the ALJ stated that he could find "no objective medical evidence" that would support the degree of disability alleged (TR 28). Under the decision in Cline, lack of evidence for pain is not a sufficient basis on which to deny social security benefits.

Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). The Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had significant pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

Under the standard set out in Luna, claimant has shown very persistent attempts to find relief for her pain, regularly seen numerous doctors, used a walker, been treated for related depression, has very limited daily activities, and takes numerous medications, some of which have adverse side affects. While the ALJ cited Luna and claimed he considered the factors (TR 26), his conclusion is not consistent with the medical evidence. He

determined that she could perform a full range of "light" work (TR 30), which "requires a good deal of walking or standing, or . . . involves sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1567(b). The ALJ's conclusion is not supported by the evidence that claimant had a great deal of difficulty walking, at least at the time of the hearing used a walker, and had one leg shorter than the other.

The ALJ should have concluded that claimant had a significant nonexertional impairment and asked the vocational expert if she could work in spite of the pain. However, the ALJ did not question the vocational expert. When questioned by claimant's counsel, the vocational expert's responses, the only evidence concerning the claimant's residual functional capacity, was that the individual described in the hypothetical question would not be able to work (TR 64-65). The ALJ disregarded these statements.

The court notes that, even if the ALJ had concluded claimant could do sedentary work, the medical-vocational guidelines developed by the Social Security Administration would have directed a finding of "disabled" under "sedentary" work, as claimant was age 55 on the date of the decision and had only an eighth grade education. While the vocational expert did not testify as to the transferability of her job skills, in order to find such transferability for individuals who are over age 55, there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry. 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule Nos. 200.00, 201.01, and 201.02. Such adjustment would undoubtedly be necessary in claimant's case, because of her physical condition.

There is no merit to claimant's contention that she has a nonexertional mental impairment. While she has experienced some depression related to her pain, she has never been treated by a mental health specialist, and no doctor has suggested that she has a mental impairment. She did not raise the issue of a mental impairment in her claim for benefits (TR 91-96).

The court notes that claimant has submitted evidence that she was found disabled and entitled to Disability Insurance Benefits on December 16, 1994, with an onset date of February 24, 1993, the day after the denial of the claim being appealed here by the Appeals Council.

The final decision of the ALJ is reversed and plaintiff is found to be disabled and entitled to disability insurance benefits under §§ 216(i) and 223 of the Social Security Act from February 9, 1990, the date she first saw Dr. Schooley for treatment for her complaints.

Dated this 19<sup>th</sup> day of January, 1995.

  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:nowlin.or

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

IN RE:  
WARLICK INVESTMENTS, LTD.,  
Debtor,  
WARLICK INVESTMENTS, LTD.,  
Plaintiff,  
vs.  
COMMONWEALTH CHARTERIC  
TRUST CO., LTD.,  
Defendant,  
and WILLIAM MICHAEL FURMAN,  
Filing as Cross Defendant.

Case No. 87-01138-W  
Chapter 11

ENTERED ON DOCKET  
DATE JAN 23 1996

Case No. 95-C-725-BU

FILED

JAN 22 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

This matter comes before the Court upon the Motion to Reconsider Order Dated January 5, 1996 Denying Appellant Leave to Proceed In Forma Pauperis. Having reviewed the motion, the Court finds that Appellant has failed to present sufficient reason for the Court to reconsider its January 5, 1996 Order.

Accordingly, the Motion to Reconsider Order Dated January 5, 1996 Denying Appellant Leave to Proceed In Forma Pauperis filed on January 19, 1996 is **DENIED**.

ENTERED this 22<sup>nd</sup> day of January, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

4

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

WARLICK INVESTMENTS, LTD.,

Debtor,

WARLICK INVESTMENTS, LTD.,

Plaintiff,

vs.

COMMONWEALTH CHARTERIC  
TRUST CO., LTD.,

Defendant,

and WILLIAM MICHAEL FURMAN,

Filing as Cross Defendant.

Case No. 87-01138-W  
Chapter 11

ENTERED ON DOCKET  
DATE JAN 23 1996

Case No. 95-C-889-BU

FILE

JAN 22 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

This matter comes before the Court upon the Motion to Reconsider Order Dated January 5, 1996 Denying Appellant Leave to Proceed In Forma Pauperis. Having reviewed the motion, the Court finds that Appellant has failed to present sufficient reason for the Court to reconsider its January 5, 1996 Order.

Accordingly, the Motion to Reconsider Order Dated January 5, 1996 Denying Appellant Leave to Proceed In Forma Pauperis filed on January 19, 1996 is **DENIED**.

ENTERED this 22<sup>nd</sup> day of January, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

IN RE:  
WARLICK INVESTMENTS, LTD.,  
Debtor,  
WARLICK INVESTMENTS, LTD.,  
Plaintiff,  
vs.  
COMMONWEALTH CHARTERIC  
TRUST CO., LTD.,  
Defendant,  
and WILLIAM MICHAEL FURMAN,  
Filing as Cross Defendant.

Case No. 87-01138-W  
Chapter 11

ENTERED ON DOCKET  
DATE JAN 23 1996

Case No. 95-C-962-BU ✓

FILE

JAN 22 1996


Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

This matter comes before the Court upon the Motion to Reconsider Order Dated January 5, 1996 Denying Appellant Leave to Proceed In Forma Pauperis. Having reviewed the motion, the Court finds that Appellant has failed to present sufficient reason for the Court to reconsider its January 5, 1996 Order.

Accordingly, the Motion to Reconsider Order Dated January 5, 1996 Denying Appellant Leave to Proceed In Forma Pauperis filed on January 19, 1996 is **DENIED**.

ENTERED this 22<sup>nd</sup> day of January, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE



FILED

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAN 22 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

VINCE BREEDLOVE,

Plaintiff,

vs.

MASSACHUSETTS MUTUAL LIFE  
INSURANCE CO., a  
corporation,

Defendant.

Case No. 95-C-550-BU

ENTERED ON DOCKET

DATE ~~JAN 23 1996~~

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 21 day of January, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

9

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
on behalf of Consolidated Farm Service Agency,  
formerly Farmers Home Administration,

Plaintiff,

v.

MARK N. BROWN aka Mark Brown;  
GINA R. BROWN;  
FIRST STATE BANK OF FAIRFAX,

Defendants.

JAN 19 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 1-22-96

CIVIL ACTION NO. 95-C-767-H ✓

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of Jan. 19, 1996 and  
the declaration of Cathryn D. McClanahan, Assistant United States Attorney, that the  
Defendants, **Mark N. Brown aka Mark Brown; Gina R. Brown; and First State Bank of  
Fairfax**, against whom judgment for affirmative relief is sought in this action have failed to  
plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now,  
therefore,

I, RICHARD M. LAWRENCE, Clerk of said Court, pursuant to the  
requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 19th day of January, 1996.

RICHARD M. LAWRENCE, Clerk  
United States District Court for  
the Northern District of Oklahoma

By S. Adamski  
Deputy

Clerk's Entry Of Default  
Case No. 95-C-767-II (Brown)  
CDM:css

5

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL SMITH,  
Plaintiff,  
vs.  
TULSA COUNTY POLICE  
DEPARTMENT,  
Defendants.

No. 95-C-1200-H

**FILED**

JAN 19 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE 1-22-96


ORDER

On December 15, 1995, the Clerk of the Court notified Plaintiff that he needed to complete a Marshal form and summons for each Defendant he is seeking to sue in this civil rights action. As of the day of this order, Plaintiff has failed to submit completed Summons and Marshal forms.

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis (docket #2) is GRANTED and this action is hereby DISMISSED WITHOUT PREJUDICE for lack of prosecution. The Clerk shall MAIL to Plaintiff a copy of his complaint.

IT IS SO ORDERED.

This 19TH day of JANUARY, 1996.

  
Sven Erik Holmes  
United States District Judge

**FILED**

JAN 19 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DANIEL J. SANDERS, *et al*,

Plaintiffs

vs.

COLLECTOR OF INTERNAL REVENUE )  
*et al*, JOHN DOES 1-10 )

Defendants. )

Case No. 95 - cv - 105 - H ✓

ENTERED ON DOCKET

DATE 1-22-96

**ORDER**

This matter comes before the court upon the motion to withdraw as Plaintiff filed by Plaintiff, Thomas L. Stuessy Sr., on January 11, 1996. Upon due consideration, the court finds that the motion should be and is hereby GRANTED. The complaint of Plaintiff, Thomas L. Stuessy Sr., against Defendants is hereby DISMISSED.

ENTERED THIS 19<sup>TH</sup> day of JANUARY, 1996.

  
HON. SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIAN BERGER, KAREN BIVENS, )  
KATHLEEN BIVENS, MICHAEL BIVENS )  
DOROTHY COOKS, RENEE FARMER, )  
RENELL REIGH FARMER, WALTER )  
RUSSELL FARMER, CAROLYN HENNING, )  
PATRICIA JOHNSON, ADLI MAHMOUD, )  
MARTHA MENDOZA, MICAELA )  
(MENDOZA) BALL, VINCENT MENDOZA, )  
MARY HELEN PITTS, FELICIA PORTER, )  
J.W. PORTER, MARJORIE SPEES, )  
RICHARD SPEES, and DENNA STARWALT, )

Plaintiffs, )

v. )

SUN REFINING AND MARKETING )  
COMPANY, )

Defendant. )

**FILED**

JAN 19 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

Case No. 92-CV-258-H ✓

ENTERED ON DOCKET

DATE 1-22-96

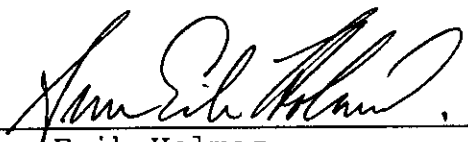
J U D G M E N T

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of Plaintiffs.

IT IS THEREFORE ORDERED that Defendant make payment in the amount of \$1 to each of the following Plaintiffs: Brian Berger, Karen Bivens, Kathleen Bivens, Michael Bivens, Dorothy Cooks, Renee Farmer, Renell Reigh Farmer, Walter Russell Farmer, Carolyn Henning, Patricia Johnson, Adli Mahmoud, Martha Mendoza, Micaela (Mendoza) Ball, Vincent Mendoza, Mary Helen Pitts, Felicia Porter, J.W. Porter, Marjorie Spees, Richard Spees, and Denna Starwalt.

IT IS SO ORDERED.

This 19<sup>TH</sup> day of January, 1996.

  
Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA **FILED**

JAN 19 1996

NORMAN POUND,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN  
SERVICES, Donna Shalala, Secretary,

Defendant.

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

No. 93-C-1058-E ✓

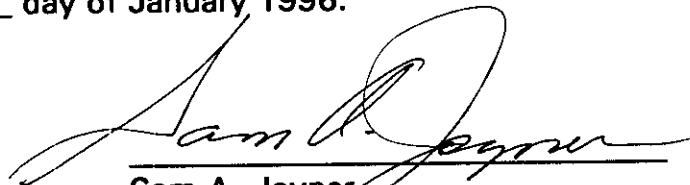
ENTERED ON DOCKET

DATE **JAN 22 1996** ✓

**JUDGMENT**

This action has come before the court for consideration. An Order remanding the case to the Administrative Law Judge was entered on November 30, 1994. Judgment is hereby entered pursuant to the court's November 30, 1994 Order.

It is so ordered this 19 day of January 1996.



Sam A. Joyner  
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

TOMMY ROGERS,

Plaintiff,

vs.

"JOHN DOE" OFFICER DUPREE,  
STANLEY GLANZ,

Defendants.

Case No. 94-C-476-B

ENTERED ON DOCKET  
DATE JAN 22 1996

**ORDER**

After careful consideration of the joint motion by Plaintiff Tommy Rogers and Defendant Stanley Glanz for an order approving the stipulation to dismissal of this case with prejudice as to Defendant Stanley Glanz, and for good cause shown, it is therefore ORDERED that the above styled case against Defendant Stanley Glanz is hereby dismissed with prejudice.

SO ORDERED THIS 19 day of Jan, 1996.

S/ THOMAS R. BRETT

CHIEF JUDGE THOMAS R. BRETT  
UNITED STATES DISTRICT COURT



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 19 1996

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT

JESSIE MARIE YARBROUGH, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FIBREBOARD CORPORATION, et al.)  
 )  
Defendants. )

No. 89-C-131-K

ENTERED ON DOCKET  
JAN 22 1996

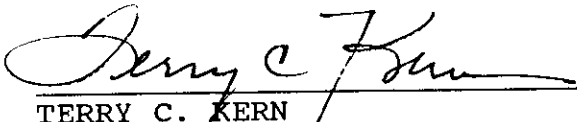
DATE \_\_\_\_\_

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 19 day of January, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

57

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ADRIAN DALE WASHINGTON,

Plaintiff,

vs.

CITY OF TULSA, CYNTHIA LUKE  
FORD, a Tulsa Police Officer,  
Individually, and in her  
official capacity as a Tulsa  
Police Officer,

Defendant.

No. 95-C-572-K

ENTERED ON DOCKET

DATE JAN 22 1996

**FILED**

JAN 19 1996

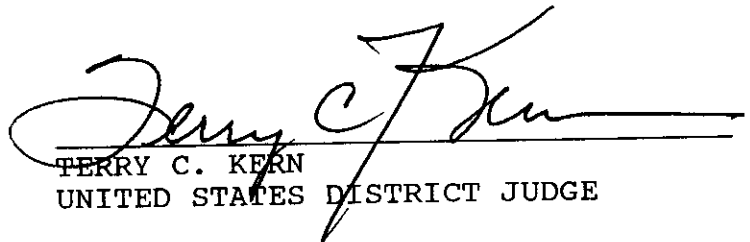
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT

O R D E R

Before the Court is the motion of the plaintiff to dismiss with prejudice. The parties have acknowledged settlement of this action and a release and satisfaction of judgment has been filed.

It is the Order of the Court that the motion of the plaintiff to dismiss with prejudice is hereby GRANTED.

ORDERED this 18 day of January, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

16